BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 16,249

EARLE L. REYNOLDS,

Appellant,

v.

UNITED STATES OF AMERICA

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

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Jurisdictional Statement

This is an appeal from a conviction and sentence in the United States District Court for the District of Hawaii. This Court has jurisdiction under 28 U.S.C. § 1291. Jurisdiction of the case below was based on 18 U.S.C. § 3231.

Statute and Regulation Involved

Section 161 of the Atomic Energy Act (42 U.S.C. § 2201, 68 Stat. 948) provides in relevant part:

> In the performance of its functions the [Atomic Energy] Commission is authorized to—

* * * * * * *

(i) prescribe such regulations or orders as it may deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this Act, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 53 or produced by any person in connection with any activity authorized pursuant to this Act, and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, and (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property;

* * * * * * *

(q) make, promulgate, issue, rescind, and amend such rules and regulations as may be necessary to carry out the purposes of this Act.

Section 223 of the Atomic Energy Act (42 U.S.C. § 2273, 68 Stat. 958) provides:

Whoever willfully violates, attempts to violate, or conspires to violate, any provision of this Act for which no penalty is specifically provided or of any regulation or order prescribed or issued under section 65 or subsections 161b, i. or p. shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both, except that whoever commits such an offense with intent to injure the United States or with intent to secure an advantage to any foreign nation,

shall, upon conviction thereof, be punished by a fine of not more than $20,000 or by imprisonment for not more than twenty years, or both.

The contested regulation of the Atomic Energy Commission is set forth in full in Appendix A, p. 78, *infra*.

Questions Presented

1. Does Section 161(i) authorize the Atomic Energy Commission to issue a regulation barring United States citizens from entering the Pacific nuclear testing zone covering 390,000 square miles of the high seas?

2. If Section 161(i) were construed to authorize the Commission to issue a regulation barring United States citizens from the testing zone under pain of severe criminal penalities, would the section then be too vague and indefinite to satisfy constitutional requirements?

3. Do the Pacific nuclear tests and the regulation under which appellant was convicted violate international commitments of the United States?

4. Was appellant deprived of First and Fifth Amendment rights under the Commission regulation which restrains peaceable protest and freedom of movement and which was adopted without the requisite notice and opportunity for hearing?

5. Was appellant denied his right under the Sixth Amendment to be defended by the counsel of his choice?

Statement of the Case

On September 15, 1957 the Atomic Energy Commission announced a new series of nuclear tests to begin in April 1958 at the Eniwetok Proving Grounds in the Pacific. Early in January 1958 the Commission received a notification from certain persons that they intended to sail their ketch, the Golden Rule, into the test area as a protest against the

holding of these nuclear tests. On February 14, 1958 the Commission issued a public notice designating a "Danger Area" to be established April 5, 1958, in connection with the tests and covering 390,000 square miles of high seas. On March 25, 1958 the Golden Rule sailed from California for Hawaii en route to carry out the announced protest. On April 11, 1958 the Commission, without notice or hearing, issued a regulation barring United States citizens from the Danger Area "except with the express approval of appropriate officials of the Atomic Energy Commission or the Department of Defense" (23 FR 2401, p. 78, *infra*). It is this regulation under which appellant was convicted and which he here challenges as invalid.[1]

Appellant is an anthropologist (R. 416). His particular field of interest is the study of the growth and development of human beings (R. 416). In 1951, when the chain of circumstances commenced which brought appellant into conflict with his Government for the first time in his life, appellant was Research Associate and Chairman of the Department of Physical Growth at the Fels Research Institute for the Study of Human Development and at the same time an Associate Professor of Anthropology at Antioch College with life tenure (R. 416). In that year appellant was asked by officials of the National Academy of Sciences to go to Japan "to set up a scientific program so that the problem of possible deleterious effect of atomic radiation on the surviving children of Hiroshima and

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[1] The facts in this first paragraph appear in the affidavit of April 22, 1958, of Kenneth E. Fields, General Manager of the Atomic Energy Commission, entered into the record of the "Golden Rule" case by the Government and referred to by Mr. Joseph L. Rauh, Jr. in his argument in the District Court for a judgment of acquittal or new trial (R. 356). On the basis of this affidavit, Mr. Rauh offered to prove at such a new trial that the regulation which appellant disregarded "was aimed solely at the Golden Rule" and that the Commission issued "it without a hearing at the last minute in order to avoid one" (R. 358).

Nagasaki could be competently studied'' (R. 416). Reluctantly, and as a ''gesture of service'', appellant accepted the assignment, went to Japan, set up his research program and resigned his permanent positions at Antioch and the Fels Research Institute (R. 416-417). Appellant spent the next three and one-half years ''studying the effects of radiation on the children of Hiroshima and Nagasaki'' (R. 417) and, not unexpectedly, ''became extremely interested . . . with the problem of radiation, particularly as it affects the growth and development of human beings'' (R. 417).

At the conclusion of the basic study in 1954 and with the understanding that appellant would return to Japan four years later to do a follow-up study (R. 417), appellant took his family around the world on the yacht Phoenix, which he had built during his stay in Hiroshima (R. 417-418). The family sailed 50,000 miles between 1954 and 1958 visiting 106 ports and talking to hundreds of people (R. 418). During the trip appellant became ''somewhat aware of the problems of the world outside of the scientists' laboratory'' (R. 418-419).

In May of 1958 the Phoenix and its crew sailed into Honolulu harbor in the midst of the Golden Rule controversy (R. 419). ''As a scientist there was no doubt in . . . [appellant's] mind, as there is no doubt in the minds of hundreds of scientists throughout the world, that there is grave danger to the human race from the fallout which accrues from testing . . .'' (R. 419-420). While the Golden Rule controversy raged, appellant spent many hours in the library studying the materials published by the Atomic Energy Commission and found their reports on fallout ''badly slanted'' (R. 420). He also came to the conclusion, on the basis of his reading and studying, that the Commission regulation, which prohibited entry into the 390,000

square-mile nuclear testing zone, was "illegal and unconstitutional" (R. 422).

Early in June, 1958, the Phoenix sailed from Honolulu en route by way of the high seas to Japan (R. 218, 423). Aboard the Phoenix were appellant, his wife, his son Ted, his daughter Jessica and a Japanese friend who had been with the Reynolds family on their trip around the world (R. 423). They had not decided at the time they sailed from Honolulu whether they would enter the prohibited zone or not (R. 423). During the next three weeks aboard ship, they read more of the accumulated literature on the dangers of nuclear fallout, talked at length among themselves about the problems involved and finally reached a mutual understanding to enter the prohibited area as a protest (R. 423-424). Appellant's motivations for this drastic step were simple: his "scientific knowledge that anything that would stop nuclear testing is bound to ultimately be to the benefit of mankind" (R. 425); his "belief that the freedom of the seas and freedom of navigation on the seas were being threatened" (R. 425); and his view that the Commission's regulation was "illegal and unconstitutional" (R. 422). He felt deeply his "unique . . . dual role of a scientist and at the same time as a yachtsman" (R. 415).

On July 1 the Phoenix approached the Danger Area with the Coast Guard cutter Planetree close by (R. 210-211). Later that day the Phoenix sent a radio message announcing that "we are entering today the nuclear testing area in protest against nuclear testing; please inform appropriate civil authorities . . ." (R. 228). The next morning, July 2, appellant was arrested by the Coast Guard cutter 65 miles inside the Danger Area and was directed to sail the Phoenix to Kwajalein (R. 211, 221).

On July 8 appellant was flown to Honolulu by military

aircraft and taken before the U. S. Commissioner for a preliminary hearing (R. 320). Appellant immediately "announced that he intended to retain a mainland attorney" for his defense (R. 320). Shortly thereafter, appellant retained Katsugo Miho, a local attorney, to handle preliminary matters prior to the time that he could contact and retain mainland counsel (R. 320).[2]

On July 21 appellant waived a grand jury indictment and a criminal information was filed against him charging a violation of the Commission's regulation prohibiting United States citizens from entering the nuclear test area (R. 3,321). On July 28 appellant received permission to go to the mainland to seek counsel (R. 321) and did retain Joseph L. Rauh, Jr., of Washington, D. C., as his counsel (R. 321-322). To allow time for Mr. Rauh to participate, appellant first sought a postponement of the argument, scheduled for August 6, upon his Motion to Dismiss (R. 322). When both the postponement and the Motion were denied (R. 322, 87), he sought a month's delay in his trial to allow Mr. Rauh time to come to Hawaii and defend him (R. 323-326). All requests to postpone the trial were denied despite the fact that appellant had himself expedited proceedings by several months by waiving grand jury indictment (R. 321) and despite the Government's lack of interest in expediting it (R. 320, 322).

The trial took place August 25 and 26 (R. 174-302). Despite the fact that appellant had discharged Mr. Miho (who had never been retained for the trial in the first place), the District Judge insisted that Mr. Miho try the case and refused requests by appellant to defend himself (R. 160-162) or even to address the Court (R. 177, 178-180, 183, 185, 202,

[2] The full factual details concerning the matter of counsel are not set forth at this point in the brief since it is deemed more convenient for the Court to consider them in connection with the argument concerning the denial of counsel. See Point V, pp. 68 to 77 *infra*.

280). After a perfunctory trial at which none of the issues presented in this brief were pressed,[3] appellant was convicted (R. 299). A Motion for Judgment of Acquittal or for a New Trial was promptly filed (R. 304) and this motion came on to be heard on September 25 (R. 328). Mr. Rauh appeared for appellant in support of the Motion for Acquittal or for a New Trial; the motion was denied (R. 411). The following day appellant was sentenced to jail for a period of two years, with provision for suspension of the sentence and placement on probation as to the last eighteen months (R. 436). The jail sentence was imposed despite the fact that appellant had never before committed as much as a traffic violation (R. 427) and despite a recommendation by the Atomic Energy Commission for leniency (R. 429, 431-432). This appeal followed.

Specification of Errors

The United States District Court for the District of Hawaii erred:

(1) In holding that Section 161(i) authorized the Atomic Energy Commission to issue a regulation barring United States citizens from entering the Pacific nuclear testing zone covering 390,000 square miles of the high seas.

(2) In failing to hold that Section 161(i), if construed to authorize the Commission to issue a regulation barring United States citizens from the testing zone under pain of severe criminal penalties, is too vague and indefinite to satisfy constitutional requirements.

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[3] It is true that some of these issues were raised by the Motion to Dismiss before trial, but when the District Court refused a postponement so that Mr. Rauh could argue the Motion to Dismiss and then denied the Motion, Mr. Miho apparently dropped all of these matters instead of seeking to raise them with an adequate factual basis at the trial (R. 174-302). All the issues were raised by Mr. Rauh in his argument in support of the Motion for Judgment of Acquittal or Motion for New Trial (R. 329-411) and are properly before this Court.

(3) In failing to hold that the Pacific nuclear tests and the regulation under which appellant was convicted violate international commitments of the United States.

(4) In failing to hold that appellant was deprived of First and Fifth Amendment rights under the Commission regulation which restrains peaceable protest and freedom of movement and which was adopted without the requisite notice and opportunity for hearing.

(5) In denying appellant his right under the Sixth Amendment to be defended by the counsel of his choice.

Summary of Argument

I

Congress did not authorize the Commission's trepass regulation of April 11, 1958. The Government's reliance upon subclause (3) of Section 161(i) of the Atomic Energy Act as its authority for the contested regulation is totally misplaced.

Subclause (3) of Section 161(i), read in the context of the Atomic Energy Act, did not authorize the issuance of the contested regulation. On its face this subclause provides only for regulations controlling activities carried on under the atomic energy program and Congress was in no sense utilizing this subclause to regulate the activities of strangers to the atomic energy program, such as one exercising his common right of travel upon the high seas. Closer examination reveals that subclause (3) is even narrower than this *prima facie* interpretation would suggest; the key words in the text, when given their plain meaning in the context of the Act, demonstrate that this subclause does not pertain even to the Commission's own weapon testing. The words "activity authorized pursuant to this Act" refer to activity of Commission licensees, not of the Commission itself, and therefore have nothing whatever to do

with its nuclear tests. Likewise the word "facilities" refers to production and utilization facilities, not to weapons or weapon tests. Moreover, the regulation did not attempt to govern "design, location and operation" of facilities. Subclause (3) was clearly intended to cover the design, location and operation of production and utilization facilities licensed by the Commission to carry out the provisions of the Act and nothing could have been farther from the minds of the legislators than the idea that this provision would cover total strangers to the atomic energy program navigating the high seas.

The enactment of a separate provision granting the Commission authority to prevent "trespass" evidences a clear Congressional intent to exclude such authority from the terms of Section 161(i). Whatever authority the Commission possesses to prevent "trespass" is found not in Section 161(i) but in Section 229 which is not involved in the present case. Not only does this separate "trespass" provision in Section 229 demonstrate that Section 161(i) includes no authority as to such matters, but the minor penalty provided for a violation of the separate "trespass" section is so at variance with the severe penalties for violations under Section 161(i) as to render incomprehensible the claim that 161(i) applies to anything resembling a trespass on areas under Commission control.

Furthermore, the Commission's own prior administrative interpretations of Section 161(i) support appellant's construction. Indeed, until the prohibitory regulation of April 11, 1958, the Commission had never before in its 12-year history of administration and weapon testing undertaken to issue such a regulation. The few regulations issued under 161(i) all related to activities of licensees and other persons acting under Commission authorization and regu-

lation and were not remotely connected with either nuclear tests or movement on the high seas.

II

Section 161(i), as interpreted by the Government, is constitutionally too vague and indefinite to sustain the attempted criminal regulation. The Government would have this Court read 161(i) to mean the same thing as 161(q), which grants the Commission catch-all authority to "make, promulgate, issue, rescind and amend such rules and regulations as may be necessary to carry out the purposes of this Act." But Congress expressly refrained from making violations of regulations issued under Section 161(q) punishable by criminal sanctions. For the Court now to read 161(i) in terms as broad as 161(q) would be to nullify the very Congressional restraint evidenced in refusing to place criminal sanctions behind vague statutory authorization.

As construed by the Government, Section 161(i) is too vague to sustain a criminal regulation for it would permit regulations "to govern any activity authorized pursuant to this Act . . . in order to protect health and to minimize danger to life or property." "Men of common intelligence" (see *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453) could not have determined whether this vague subclause authorized a regulation prohibiting American citizens from entering 390,000 square miles of the high seas. Moreover, all apart from the Fifth and Sixth Amendments and even if the regulation could be deemed to cure statutory vagueness, the vague delegation of criminal regulatory authority raises serious constitutional issues under the doctrine of separation of powers. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388; *Schechter Corp.* v. *United States,* 295 U.S.

495. Particularly where the administrative regulation would create a novel and extraordinary crime, as in this case, the delegation of authority to do so must be clear and definite. *Fahey* v. *Mallonee,* 332 U.S. 245, 249, 250.

III

The Pacific nuclear tests and the regulation under which appellant was convicted violate international commitments of the United States. The tests cause world-wide contamination contrary to legal commitments of the United States under the United Nations Charter. Furthermore, the removal of the Marshall Islanders and the destruction of their lands and resources violate the United States obligations under the Trusteeship Agreement for the Trust Territory of the Marshall Islands. Moreover, the closing off from ocean traffic of 390,000 square miles of the Pacific is a massive invasion of the international freedom of the high seas which the United States is committed to observe.

Nothing in the Atomic Energy Act sufficiently evidences Congressional intent to violate international commitments so as to authorize the Pacific nuclear tests or the contested regulation. The courts will not lightly assume that Congress has effected a unilateral renunciation of solemn international obligations of the United States; the abrogation of international commitments requires explicit statutory language whether such commitments be under recognized international law or treaty. Certainly in the absence of an explicit Congressional declaration, every presumption should be indulged against finding within the Atomic Energy Act authorization for prohibitory regulations incidental to nuclear tests which subject the population of the world to radiation-induced illness, which violate our treaty commitments to the Marshall Islanders and which entail massive infringement upon the freedom of the high seas.

IV

Appellant was deprived of First and Fifth Amendment rights under the Commission regulation which restrains peaceable protest and freedom of movement and which was adopted without the requisite notice and opportunity for hearing.

As the Supreme Court so recently held in *Kent* v. *Dulles*, 357 U.S. 116, the right to travel is a part of the "liberty" of the citizen protected by the due process clause of the Fifth Amendment. The contested regulation constitutes a deliberate restriction by the Commission upon the right of a small group of protestors to sail the high seas, assuming for themselves the risk of contamination danger. We suggest to the Court that, as in the *Kent* case, it refrain from passing upon this serious constitutional issue by giving the statute a reasonable construction excluding the power to issue regulations restricting freedom of travel on the high seas.

The rule of avoidance of constitutional issues is doubly applicable here, for the Commission's regulation infringes upon appellant's freedom of protest under the First Amendment as directly as it does upon his freedom of movement under the Fifth. Freedom of protest is not an empty right to be exercised by ineffective intellectual conversation only; it is a substantial right that may be exercised, as here, in its most dramatic and attention-getting manner. This is especially true in the instant case where the Commission had one purpose and one purpose only behind its reguation—to prevent the very type of protest appellant sought to make.

The contested regulation violates the due process clause of the Fifth Amendment because issued without notice or hearing. Where a proposed rule affects a particular identifiable group as distinct from the public at large, the constitutional requirement of notice and hearing has been held

to apply. Since the Commission was fully aware of the mere handful of people who would protest its action, we cannot conceive of a regulation more particular in its application to an easily identifiable group. Moreover, in the light of the Commission's knowledge that its regulation had immediate impact only upon such a handful of persons, the promulgation of the regulation was the exercise of an "adjudicatory" rather than a "legislative" function. Thus the Commission's failure to afford the few persons affected by its proposed regulation an opportunity to be heard prior to its promulgation renders the regulation defective under the due process guarantee of the Fifth Amendment.

V

Appellant was denied his right under the Sixth Amendment to the Constitution to be defender by his chosen counsel. He retained a local counsel, Mr. Katsugo Miho, not to undertake his defense, but only to handle preliminary matters until appellant could obtain mainland counsel qualified to handle a case involving statutory and constitutional issues of the first magnitude. At the first opportunity appellant went to the mainland and retained mainland counsel, Mr. Joseph L. Rauh, Jr., to represent him. The District Judge refused appellant a reasonable delay so that Mr. Rauh could come to Hawaii and represent him and forced Mr. Miho to represent appellant even after the latter had discharged Mr. Miho and had requested the right to represent himself at the trial. The Judge took this unusual action despite the fact that he had authorized appellant's trip to the mainland to obtain counsel, despite the fact that appellant had himself expedited the trial by waiving grand jury indictment, despite the fact that the Government had acquiesced in a reasonable postponement, and despite the fact that there is no compar-

able case of speed in recent months in the Hawaii District Court.

As the Court was repeatedly informed prior to trial, Mr. Miho, whom the Court ordered to defend appellant at the trial, had never been retained by appellant for that purpose and had previously been dismissed as his attorney for any purpose whatever. Mr. Miho's representation of appellant at the trial clearly did not meet the Sixth Amendment's requirement of effective assistance of counsel nor the Sixth Amendment's guarantee of assistance of chosen counsel. Furthermore, it was totally arbitrary and capricious and a clear violation of appellant's Sixth Amendment rights to deny him the right to represent himself at the trial and to force him to accept representation by an attorney he did not desire.

ARGUMENT

I

Congress Did Not Authorize the Commission's "Trespass" Regulation of April 11, 1958

The Commission regulation (see p. 78, *infra*) prohibiting American citizens and others from entering the 390,000 square-mile "Danger Area" of the Pacific high seas, without the express approval of "appropriate officials of the Atomic Energy Commission or the Department of Defense", was issued under the purported authority of Section 161(i) of the Atomic Energy Act (68 Stat. 948; 42 U.S.C. § 2201(i)). The criminal information asserts the same statutory authority for the regulation.

Section 161(i) provides:

> General Provisions.—In the performance of its functions the Commission is authorized to—
>
> * * * * *
>
> (i) prescribe such regulations or orders as it may

> deem necessary (1) to protect Restricted Data received by any person in connection with any activity authorized pursuant to this Act, (2) to guard against the loss or diversion of any special nuclear material acquired by any person pursuant to section 53 or produced by any person in connection with any activity authorized pursuant to this Act, and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security, and (3) to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property;''

In issuing the contested regulation the Commission made no claim that it was for any of the purposes specified in subclause (1) or (2) of Section 161(i). It was not to protect Restricted Data, or to guard against loss or misuse of special nuclear material. The avowed purpose was ''to avoid any unnecessary delay or interruption'' of the Commission's atomic weapon tests in the Pacific and ''to protect the health and safety of the public''.[4]

Thus, if the Commission's regulation is to stand, it can do so only upon the basis of the authority contained in subclause (3). But, as we shall show, the language of the subsection, the adoption of a separate ''trespass'' provision, and the administrative practice under Section 161(i) all refute the broad interpretation asserted by the Government.

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[4] Similarly, Government counsel below placed his reliance as authority for the contested regulation upon subclause (3) (R. 387).

A. *Subclause (3) of Section 161(i) Read in the Context of the Entire Atomic Energy Act Did Not Authorize the Issuance of the Contested Regulation*

Subclause (3) authorizes the Commission to prescribe regulations:

> "to govern any activity authorized pursuant to this Act, including standards and restrictions governing the design, location and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property;"

Even a cursory look at this provision makes it clear that in subclause (3), as in the preceding subclauses (1) and (2), Congress was in no sense regulating the activities of strangers to the atomic energy program, such as one exercising his common right of travel upon the high seas. On its face, this subclause provides only for regulations controlling activities carried on under that program. The very fact that 161(i) failed to reach those unconnected with the atomic energy program made it necessary later to enact a separate trespass provision (see Point B, *infra*, pp. 24 to 29); the trespass section, which reaches persons completely unconnected with the program, buttresses the interpretation, clear on the face of the statute, that subclause (3) was not intended to govern strangers to that program. What Congress sought to govern in subclause (3) were activities of those voluntarily engaged in the atomic energy program, not activities of utter strangers seeking to protest aspects of that program.

Closer examination reveals that subclause (3) is even narrower than the foregoing *prima facie* interpretation would suggest. The key words in the text, when given their plain meaning in the context of the Act, demonstrate

that subclause (3) does not pertain even to the Commission's own weapon testing.

We turn then to an examination of these key words. Is atomic weapon testing the type of "activity" authorized to be governed under subclause (3)? Are atomic weapons the type of "facilities" intended to be governed thereunder? Did this provision empower the Commission to restrict navigation on the high seas by individuals unconnected with any person, activity or facility authorized to partake in the atomic energy program?

Each and all of these basic questions must be answered in the negative. As will be shown, (i) the type of "activity" to be regulated under subclause (3) does not include Commission tests of atomic weapons, but only activities of persons authorized by the Commission under the Act to engage in other aspects of the atomic energy program; (ii) the "facilities" referred to are those capable of producing or utilizing special nuclear material and by statutory definition exclude atomic weapons; and (iii), even if such weapons could conceivably be deemed "facilities" within the meaning of Section 161(i), the contested regulation does not establish standards and restrictions "governing the design, location and operation" of the weapons being tested.

(i) *"Activity authorized pursuant to this Act" refers to activity of Commission licensees, not of the Commission itself.* There are several keys to the meaning of subclause (3). Foremost is its repetition of a phrase, common to all other parts of Section 161(i), substantively tying subclauses (1), (2) and (3) into a unified comprehensible pattern. All three parts contemplate regulations pertaining to an "activity authorized pursuant to this Act". The Act authorizes some activities to be performed by the Commission and some to be performed by others. Analysis will show that Section 161(i) does not pertain to activities as-

signed to the Commission, such as atomic weapon testing, but only to activities to be performed by others under Commission authorization and regulation.

Subclauses (1) and (2) permit regulations specifically affecting *persons* engaged in activities authorized under the Act. The Commission, however, is not a "person". Section 11(q) of the Act defining "person" expressly excludes the Commission (68 Stat. 922; 71 Stat. 576; 42 U.S.C. § 2014(q)). In light of this statutory definition, the activities to be regulated plainly do not include the Commission's nuclear testing activity in the military application of atomic energy under Section 91(a) (68 Stat. 936; 42 U.S.C. § 2121(a)).

The Act contemplates a variety of activities by "persons" authorized to participate in the atomic energy program. For example, Section 31(a) directs the Commission to make arrangements with public or private institutions or persons to conduct research and development activities (68 Stat. 927; 70 Stat. 1069; 42 U.S.C. § 2051(a)). Section 41(b) authorizes the Commission to make contracts with persons to produce special nuclear material (68 Stat. 928; 41 U.S.C. § 2061(b)). Sections 103 and 104 permit the Commission to license, for certain commercial, industrial, research and development purposes, facilities for the production or utilization of such material (68 Stat. 936, 937; 70 Stat. 1071; 42 U.S.C. §§ 2133 and 2134). Section 107 directs the Commission to issue licenses to individuals to operate various kinds of production and utilization facilities (68 Stat. 939; 42 U.S.C. § 2137).

But only the Commission and, with its authorization, the Department of Defense—with the express consent and direction of the President—may produce or possess atomic weapons (Secs. 91 and 92, 68 Stat. 936; 42 U.S.C. §§ 2121 and 2122). Thus the Act sharply distinguishes between ac-

tivities to be conducted by *persons* and those to be conducted by the Commission, alone or with the Department of Defense. Atomic weapon testing falls clearly in the latter category.

Subclause (1), as previously noted, permits regulations "to protect Restricted Data received by any *person* in connection with any *activity authorized pursuant to this Act*" (emphasis supplied). Regulations to protect Restricted Data within the Commission itself are contained or amply provided for elsewhere in the statute—for example, Sections 141-146, 161(k) and (q), 221-230 (68 Stat. 940-943; 70 Stat. 1071; 68 Stat. 948; 68 Stat. 958-959; 70 Stat. 1070; 42 U.S.C. §§ 2161-2166, 2201(k) and (q) 2271-2278(b)).

Subclause (2) permits regulations "to guard against the loss or diversion of any special nuclear material acquired by any *person pursuant to section 53* or produced by any *person* in connection with any *activity authorized pursuant to this Act,* and to prevent any use or disposition thereof which the Commission may determine to be inimical to the common defense and security" (emphasis supplied). Here again the activities to be regulated are plainly not those of the Commission, but of others. Under Section 53 referred to in this provision the Commission may, for the purpose of facilitating certain extra-Commission research, development and other activities, issue licenses for the possession of special nuclear material and make such material available to qualified applicants (68 Stat. 930; 42 U.S.C. § 2073). Under Sections 103 and 104, as previously noted, the Commission may license production facilities for certain purposes, and under 31(a) make arrangements for research and development by private or public institutions or persons that may involve production of special nuclear material. Subclause (2) of Section 161(i) authorizes regulations to guard against the loss, diversion or improper use or dis-

position of such material so acquired or produced by any *person.*

In view of the clear import of subclauses (1) and (2), it will be seen that subclause (3), on which the contested regulation depends, falls into a logical pattern. Within the framework and limitations of Section 161(i) as a whole, this provision rounds out the Commission's authority to regulate certain activities of licensees, contractors and other *persons* authorized under the Act. Whereas subclauses (1) and (2) relate to safeguarding Restricted Data and special nuclear material available to such persons, in the interest of the common defense and security, subclause (3) aims at protecting health, life and property, particularly in regard to the design, location and operation of *facilities.* But in common with the preceding parts, it concerns "any activity authorized pursuant to this Act", and there is nothing to suggest that such activity is different in type from that referred to in subclauses (1) and (2) or that the same phrase in the same subsection is now intended to be suddenly so broadened as to encompass the Commission's own atomic weapon tests.

(ii) *"Facilities" refers to production and utilization facilities, not weapons or weapon test devices.* Other language of subclause (3) reinforces the conclusion that subclause (3), like the preceding parts, relates to activities authorized under the Act to be performed by licensees, contractors and other persons. While it does not employ the word "person", it refers to "facilities". This reference is neither accidental nor incidental. Since other parts of Section 161(i) contain no provision for standards to govern the design, location and operation of facilities used in licensed and authorized activities, subclause (3) serves to complement the other parts in this respect. It also complements Section 161(b), which provides for security and

safety standards to govern the possession and use of *materials,* but contains no reference to facilities (68 Stat. 948; 42 U.S.C. § 2201(b)).

The central phrase in subclause (3)—"including standards and restrictions governing the design, location and operation of facilities used in the conduct of such activity [i.e., activity authorized pursuant to this Act]"—clearly limits the scope of the subclause. Whether or not this phrase excludes everything not expressly enumerated therein,[5] it certainly excludes, under the doctrine of *ejusdem generis,* regulations entirely different in kind and unrelated to those specified in the "including" clause. This interpretation is buttressed by the fact that, if the "including" clause were no limitation upon the scope of subclause (3), the subclause would be too vague to support a regulation with criminal penalties. See Point II, *infra,* pp. 34 to 42. Thus the words of the "including" clause are vital to a proper understanding of the scope of subclause (3).

What then is meant by "facilities?" The Act defines and refers to two types of facility—"production facility" and "utilization facility". The former means a facility or important component part thereof capable of producing special nuclear material; by no stretch of imagination can this include an atomic weapon (Sec. 11(t), 68 Stat. 922; 71 Stat. 576; 42 U.S.C. § 2014(t)).[6] The latter means a facility or important component part thereof capable of making use of special nuclear material; but *the definition expressly excludes any atomic weapon, weapon prototype or weapon test device* (Secs. 11(aa) and 11(d); 68 Stat. 922; 71 Stat.

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[5] *"Expressio unius est exclusio alterius." See Sutherland, Statutory Construction,* 3rd ed., Vol. 2, Secs. 4915-4916 and cases cited.

[6] "Special nuclear material" is defined in the Act as plutonium, uranium enriched in the isotope 233 or 235, and any other material which the Commission determines to be special nuclear material (Sec. 11(y), 68 Stat. 922; 71 Stat. 576; 42 U.S.C. § 2014(y)).

576; 42 U.S.C. §§ 2014(aa) and 2014(d)). Thus the "facilities" whose design, location and operation can be regulated under Section 161(i)(3) do not include an atomic weapon, weapon prototype or weapon test device.

(iii) *The regulation did not attempt to govern "design, location and operation" of facilities.* Even if the term "facilities" could conceivably be deemed to include atomic weapons—which by definition it cannot—the contested regulation did not govern "the design, location and operation" of atomic weapons and this is all that subclause 3 permits to be regulated with respect to "facilities." The regulation set up no standards and restrictions governing the "design, location and operation" of anything; it purported to govern something quite different, to wit, movement and navigation on the high seas. Movement and navigation on the high seas are outside the ambit of the key words "facilities", "design, location and operation," and "activity authorized pursuant to this Act."

(iv) *Conclusion.* Subclause (3) of Section 161(i) has no pertinence whatever to the subject matter of the regulation at bar. On its face, it clearly excludes the regulation of activities of strangers to the atomic energy program. Moreover, the words "activity authorized pursuant to this Act", "design, location and operation," and "facilities", given their plain meaning in context, concern matters wholly different from those sought to be regulated in the contested prohibition. Subclause (3) was clearly intended to cover the design, location and operation of production and utilization facilities licensed by the Commission to carry out the provisions of the Act. Nothing could have been farther from the minds of the legislators than the idea that such a provision would one day be stretched to bar United States citizens, total strangers to the Atomic Energy program, from 390,000 square miles of open seas. Indeed, if the showing already made could leave any doubt on this score,

the separate "trespass" provision in the Act gives direct refutation to the claimed elasticity of subclause (3) of Section 161(i).

B. *The Enactment of a Separate Provision Granting the Commission Authority to Prevent "Trespass" Evidences a Clear Congressional Intent to Exclude Such Authority From the Terms of Section 161(i)*

Congress of course has not left the Commission powerless to exclude unauthorized persons from its facilities and weapon testing grounds. The authority which Congress granted for this purpose, however, is not contained in Section 161(i), as asserted by the Government, but is separately and expressly provided for in Section 229(a) (70 Stat. 1070; 42 U.S.C. § 2278a(a)). The latter provision, specially enacted to prevent trespasses, provides:

> "Sec. 229. Trespass Upon Commission Installations.—a. The Commission is *authorized to issue regulations relating to the entry upon* or carrying, transporting or otherwise introducing or causing to be introduced any dangerous weapon, explosive, or other dangerous instrument or material likely to produce substantial injury or damage to persons or property, into or upon *any facility, installation, or real property subject to the jurisdiction, administration, or in the custody of the Commission.* Every such regulation of the Commission shall be posted conspicuously at the location involved" (emphasis supplied).

This provision plainly delineates the Commission's authority to prohibit entry upon areas subject to Commission control. Its existence in a separate section explicitly devoted to this purpose compels the conclusion that the Commission's regulatory power in regard to trespass

upon areas subject to Commission control is contained exclusively in Section 229(a). By the same token it demonstrates again that Section 161(i) was never intended as a vehicle of regulatory power to exclude persons from Commission proving grounds or other places under Commission control.

(i) *Whatever authority the Commission possesses to prevent "trespass" is found not in Section 161(i) but in Section 229(a).* The original Act of 1946, although providing for various other types of regulation, did not contain the provisions now included in Section 161(i). Nor did it contain the "trespass" provision now found in Section 229(a). During consideration of the bills which led to the Act of 1954, the Commission requested passage of both sections.[7]

After eight years' experience with the program's administration and with atomic weapon testing, the Commission's requests in 1954 for *both* 161(i) *and* a "trespass" provision are highly significant to the statutory interpretation question in this case. For, if, as the Government now contends, Section 161(i) was sufficient authority to prohibit entry upon a huge area of the high seas extending far beyond the Eniwetok proving grounds, it certainly would have been sufficient, without more, to prohibit unauthorized entry upon the proving grounds themselves or any other installation or property within the jurisdiction or administration of the Commission. The 1954 request for a "trespass" section *in addition* to Section 161(i) refutes the contention that 161(i) was sufficient authority for the purpose now asserted.

The 1954 Act added Section 161(i) but not the trespass section to the statute. The latter, now Section 229(a),

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[7] Hearings before Joint Committee on Atomic Energy on S. 3323 and H. R. 8862, 83rd Cong., 2nd Sess., pp. 562-563, 601, 608, 611-612, 670.

was not added until two years later in 1956, along with some 13 other amendments requested by the Commission.[8] Congressional enactment of the trespass provision two years after 161(i) was on the books is even more significant than the Commission's request therefor in 1954. For, if 161(i) is sufficient authority to prohibit entry upon the high seas, Section 229(a), providing for more limited prohibitions, would have been superfluous. It cannot be presumed that, in adding 229(a) in 1956, Congress enacted an unnecessary and superfluous statute. *United States* v. *Menasche,* 348 U.S. 528, 538-9; *Sutherland Statutory Construction,* 3rd Ed., Vol. 2, Sec. 4705 and cases cited; *Kent's Comm.* (13th ed., 1884) 462. On the contrary, the only conclusion that can reasonably be drawn is that no authority has ever resided in Section 161(i) to regulate trespasses on areas under Commission control and that whatever "trespass" authority Congress deemed necessary to delegate for this purpose is contained exclusively in Section 229(a).[9]

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[8] Pub. Law 1006, 84th Cong., 2nd Sess., chap. 1015, sec. 6, 70 Stat. 1070. See 102 Cong. Rec., 84th Cong., 2nd Sess., p. 13255.

[9] What little legislative history we could find on Section 161(i), other than in relation to the trespass section, is entirely consistent with apellant's interpretation.

In the hearings on the 1954 bill before the Joint Committee on Atomic Energy, Commissioner Campbell of the Atomic Energy Commission explained Section 161(i) as an integrated unit, with all its provisions having a common denominator in terms of "activities authorized pursuant to the Act"; and he made no suggestion that this key phrase was intended to include the Commission's own weapon testing. He testified:

> "Section 161(i) expressly gives the Commission authority to prescribe enforcible regulations and orders to protect the security of information and of materials, and to provide additional health and safety protection in connection with any activities authorized pursuant to the Act" (Hearings before Joint Comm. On Atomic Energy on S. 3323 and H. R. 8862, 83rd Cong. 2nd Sess., p. 601)

The only other witness who addressed himself to the provisions in question expressed the understanding, never disputed by any member

It is, of course, unnecessary to determine whether Section 229 would have supported the contested regulation, had the Commission sought to base it upon that provision of the Atomic Energy Act. The Commission did not do so; it rested on 161(i) alone. The Government likewise based its information against appellant solely upon 161(i) and in argument below relied exclusively upon that section. Furthermore, the penalty limitations of Section 229, as we shall show, would have precluded any prison sentence such as was imposed on appellant. For present purposes, it is enough that, to the extent the Commission is authorized to promulgate regulations against trespass into areas of its control and jurisdiction, authority is found only in provisions of the Act other than Section 161(i) here involved.

(ii) *The comparative penalties under Section 229 and Section 223.* Not only does the separate trespass provision in Section 229 demonstrate that Section 161(i) includes no authority regarding trespass, but the minor penalty provided for a violation of the trespass section is so at variance with the severe penalties for violations under Section 161(i) as to render incomprehensible the claim that 161(i) applies to anything resembling a trespass on areas under Commission control.

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of the Committee or the Congress, that they pertain to the regulation of "licensees". Mr. William A. Steiger, of the National Association of Manufacturers, testified in pertinent part as follows:

> ". . . This Chapter authorizes the Commission to do a number of things including the establishment of standards of safety for licensees . . ." (*Ibid.*, p. 465)

The Joint Committee report on the measure was consistent with these interpretations. It said in pertinent part:

> "Section 161 permits the Commission . . . to prescribe regulations to protect restricted data, to guard against the loss or diversion of special nuclear material, and to govern activities authorized pursuant to the bill, including health and safety regulations; . . ." (S. Rep. 1699, 83rd Cong., 2nd Sess., on S. 3690, p. 26).

For a violation of a regulation issued under 161(i), where there is no intent to injure the United States, Section 223 stipulates punishment by "a fine of not more than $5,000 or by imprisonment for not more than two years, or both" (68 Stat. 958; 42 U.S.C. § 2273).[10] Under this section appellant was sentenced to two years' imprisonment, with provision for suspension of the sentence and placement on probation as to the last 18 months. For a violation of a trespass regulation issued under 229(a), where there is no fence, wall, or other structural barrier, Section 229(b) provides for no imprisonment whatever and only "a fine of not more than $1,000" (70 Stat. 1070; 42 U.S.C. § 2278a (b)).[11]

Thus, if appellant had sailed into Eniwetok itself with a boatload of dynamite and had been prosecuted and convicted under the trespass section, he would have been subject to no jail sentence whatever and no greater fine than $1,000. Yet, under the loose interpretation of 161(i) indulged by the Government and the court below, we have the incongruity of a two-year sentence for merely entering the 390,000 square-mile prohibited area of the high seas hundreds of miles from Eniwetok. This anomalous result alone is refutation of the Government's elastic claim of authority under 161(i). Cf. *Buzzard* v. *Commonwealth*, 134 Va. 641, 652-655 (1922).

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[10] Where there is intent to injure the United States or advantage a foreign nation, the offense is punishable under 223 by "a fine of not more than $20,000 or by imprisonment for not more than twenty years, or both."

[11] Where the installation is enclosed by a fence or wall, etc., Sec. 229(c) imposes more severe punishment, but still less than for a violation of regulations under 161(i)—to wit, "a fine of not to exceed $5,000" or "imprisonment for not more than one year, or both" (70 Stat. 1070; 42 U.S.C. § 2278a(c). Of course where sabotage or espionage is involved, other statutes apply, and the penalties are extremely severe—for example, 62 Stat. 799; 18 U.S.C. § 2153.

This wide disparity in punishment supports appellant's construction of Section 161(i) and adds still more weight to appellant's interpretation of the statutory scheme. If 161(i) relates, as appellant contends, to activities of licensees and other persons participating in the atomic energy program under Commission authorization and regulation, it is important, in view of the risks involved in such activities, to provide stiff penalties for violations of regulations governing: (1) protection of restricted data received by such persons, (2) prevention of loss or misuse of special nuclear material acquired or produced by such persons, and (3) assurance of safe and proper design, location and operation of facilities used by such persons. On the other hand, trespasses on the Commission's own well guarded installations would hardly warrant such stiff penalties. As to such trespasses, particularly where the security factor is so slight that the installation is not even enclosed by a fence or wall, there is obviously less risk and less need for severe deterrent punishment.

In apparent recognition of these and perhaps other distinctions, Congress imposed sterner penalties for wilfully errant licensees entrusted with atomic energy activities than for strangers to the program whose sole offense is trespass upon a Commission installation. The existence of the separate "trespass" provision in Section 229, with lesser penalties appropriate to a simple trespass offense, and the legislative history of 161(i) in relation to the trespass provision, all refute the claimed broad authority of Section 161(i).

C. *The Commission's Prior Administrative Interpretations of Section 161(i) Support Appellant's Contention*

Until the prohibitory regulation of April 11, 1958, the Commission had never before in its 12-year history of

administration and weapon testing undertaken to issue such a regulation, either under Section 161(i) of the 1954 Act or any provision of the original Act or its amendments.

The Commission has conducted numerous tests not only at the Eniwetok but also at the Nevada proving grounds, where the need "to protect the health and safety of the public" is obviously more relevant and acute. Yet the Commission has never invoked 161(i) to protect public safety in connection with any of its domestic tests.

A number of Commission regulations have been rested on the authority of Section 161 generally (containing 18 sub-sections), but in only four instances, as far as we can find, has the Commission previously relied specifically on sub-section (i). In none of these four instances did the regulation pertain to weapon tests. They all related to activities of licensees and other persons acting under Commission authorization and regulation:

(i) Part 95 of the Commission Regulations, issued February 2, 1956, is predicated on Section 161(i) and concerns "Safeguarding of Restricted Data"; it expressly applies only to "persons who receive access to Restricted Data under an Access Permit" (Sec. 95.2; 21 FR 718).

(ii) Part 71 of the Commission Regulations, published September 21, 1957, is also predicated on Section 161(i) and consists of "Regulations To Protect Against Accidental Conditions Of Criticality In The Shipment Of Special Nuclear Material"; it similarly applies only to "persons licensed to receive, possess, use or transfer special nuclear material" (Sec. 71.2; 22 FR 7540).

(iii) In Part 50, governing "Licensing Of Production And Utilization Facilities", published January 18,

1956, Section 50.54(i) is rested specifically on Section 161(i); it provides: "The licensee shall not permit the manipulation of the controls of any production or utilization facility by anyone who is not a licensed operator as provided in Part 55 of this Chapter" (21 FR 355).

(iv) In Part 55, governing "Operators' Licenses", published January 3, 1956, Section 55.2(b) is likewise rested specifically on Section 161(i); it provides: "No individual shall manipulate the controls of any facility licensed pursuant to Part 50 of this chapter without a valid license issued pursuant to the regulations in this part" (21 FR 6).

Thus in all previous cases where the Commission invoked Section 161(i) as its authority, the regulations pertained to activities of licensees and other persons authorized under the Act to engage in some part of the atomic energy program. In no case did the Commission interpret Section 161(i) as a source of power to regulate its own weapon testing activities or to regulate citizens or others unconnected with any person, activity or facility in the atomic energy program.

D. *The Language of Section 161(i), the Separate Trespass Provision, and the Administrative Interpretations by the Commission, All Complement Each Other in Support of Appellant's Construction*

The contested regulation of April 11, 1958 was issued under the alleged authority of Section 161(i) of the Act; this was the basis on which appellant was convicted and sentenced. We have shown, however, that 161(i) provided no authority whatever for the regulation. On its face, 161(i) clearly excludes the regulation of activities of stran-

gers to the atomic energy program. Going further and analyzing its key words in context, 161(i) confers regulatory powers on the Commission to govern activities of licensees, contractors and other persons authorized by the Act to participate in the atomic energy program under Commission supervision. Neither by its terms nor even by stretching its terms does 161(i) pertain to the Commission's own weapon tests or to citizens, such as appellant, who are unconnected with any person, activity or facility in the atomic energy program.

The conclusion that 161(i) provided no authority to prohibit entry into the high seas around Eniwetok is strongly reinforced by the fact that the statute contains an altogether different and separate provision prohibiting unauthorized entries into areas of Commission control. The separate penalty provision in Section 229 for violations of "trespass" regulations, imposing lesser penalties than those stipulated in Section 223 for violations of regulations issued under 161(i), confirms appellant's textual interpretation of 161(i).

In the past the Commission has itself recognized the narrow scope of Section 161(i). Its own prior administrative interpretations of 161(i) support the appellant's, not the Government's, contentions.

Thus, all accepted aids to statutory construction complement each other to exclude from the Commission's authority under Section 161(i) the power to issue the contested regulation. When narrowly construed, as Section 161(i) must be, it affords not even a color of the authority claimed in this case.

Here the Government invokes the criminal sanctions of Section 223 to punish appellant's disregard of the regulation. Accordingly, the Court must be guided by the ele-

mentary rule of strict construction; no vagueness or indefiniteness in the terms of 161(i) and no uncertainty as to the nature and extent of the regulatory power conferred upon the Commission can be exerted in favor of the prosecution against one accused of crime. *United States* v. *Wiltberger,* 5 Wheat. (18 U.S.) 76; *Sutherland Statutory Construction, supra,* Vol. 3, Sec. 5604 and cases cited.

Having in mind this axiom of statutory construction, can it be said that 161(i) empowered the Commission to make it a crime to sail into or enter a vast area of the high seas hundreds of miles from Eniwetok? Did it empower the Commission to make it a crime to disregard an edict prohibiting such navigation or movement? Emphatically not. Narrowly construed, Section 161(i) cannot remotely be claimed to authorize the Commission to police navigation or movement on the high seas or to create any novel *extraterritorial* crime in this area of activity.[12] The section is silent on navigation or movement on the high seas. It deals only with regulatory power to govern "any activity authorized pursuant to this Act". If it is not clear, as appellant contends, that this phrase applies only to activities of licensees, contractors and other persons authorized to participate in the atomic energy program, certainly it is even less clear that it pertains to the Commission's own weapon testing or to the travel of strangers to the Commission's program. If 161(i) could be deemed to have any pertinence whatever to such matters, the most that could be said in this regard is that the section is indefinite, ambiguous and vague. We turn now to the issue of vagueness.

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[12] See p. 58n., *infra.*

II

Section 161(i), as Interpreted by the Government, Is Constitutionally too Vague and Indefinite to Sustain the Attempted Criminal Regulation

The prosecution, conviction and sentence below were based on Section 223 of the Act (68 Stat. 958; 42 U.S.C. § 2273) which provides:

> "Sec. 223. Violation of Sections Generally.—Whoever willfully violates, attempts to violate, or conspires to violate, any provision of this Act for which no penalty is specifically provided or of any regulation or order prescribed or issued under section 65 or subsections 161b., i., or p. shall, upon conviction thereof, be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both, except that whoever commits such an offense with intent to injure the United States or with intent to secure an advantage to any foreign nation, shall, upon conviction thereof, be punished by a fine of not more than $20,000 or by imprisonment for not more than twenty years, or both."

The most noteworthy thing about Section 223 is the care with which Congress limited the areas in which the Commission may promulgate regulations punishable by criminal sanctions. Thus, no criminal sanctions attach to violations of regulations issued under Section 161(q) which grants the Commission catch-all authority to "make, promulgate, issue, rescind and amend such rules and regulations as may be necessary to carry out the purposes of this Act" (68 Stat. 948; 42 U.S.C. § 2201(q)). This omission from penal Section 223 of any reference to regulations under 161(q) explains, of course, why the contested regulation was predi-

cated upon the authority of 161(i) rather than 161(q). But, as we shall show, what the Government is trying to do here is to rewrite Section 161(i) to give it as broad a scope as 161(q), which Congress deemed too broad to support criminal sanctions.[13]

(i) *Legislative history of 161(q) demonstrates Congressional adherence to constitutional requirements.* An atomic energy bill in 1945, a year before Congress passed the original Act, included broad power to issue regulations, similar in scope to the power now contained in 161(q) (H.R. 4566, 79th Cong., 1st Sess., Sec. 5(a)(3)). A minority report of the House Military Affairs Committee complained that, in light of the provision for criminal enforcement, the authority was so unlimited as to involve a serious constitutional question (H. Rep. 1186, Part 2, 79th Cong., 1st Sess., pp. 3-6). When Congress subsequently passed the original Act of 1946, it included no such broad regulatory authority and confined criminal penalties to violations of express statutory prohibitions and of regulations issued under specified limited delegations (Sec. 16(b) of the 1946 Act, Pub. Law 585, 79th Cong., Ch. 724, 2nd Sess.; 60 Stat. 773).

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[13] The omission of Section 161(q) from Section 223 is not the only evidence of Congressional intent to narrow the areas in which the Commission could make conduct criminal by the issuance of regulations. Congress was very careful to limit the criminal penalties to those types of regulations which are of special significance to the statutory scheme of a supervised atomic energy program. Section 223 attaches such penalties only when the regulations are issued under "section 65 or subsections 161(b), (i), or (p)." Section 65 provides for regulations requiring reports with respect to the possession, extraction and handling of source material, that is, uranium, thorium, etc. (68 Stat. 933, 922; 71 Stat. 576; 42 U.S.C. §§ 2095 and 2014(x)). Section 161(b) provides for security and safety regulations governing possession and use of special nuclear material, source material and byproduct material (68 Stat. 948, 922; 71 Stat. 576; 42 U.S.C. §§ 2201(b) and 2014(y), (x), (e)). Section 161 (p) provides for regulations covering reports, records and inspection of licensed activities and contracted research activities (68 Stat. 948; 42 U.S.C. § 2201(p)).

The broad catch-all regulatory power now contained in Section 161(q) was added by an amendment in 1953, then designated as subsection 10 of Section 12(a) of the Act (67 Stat. 241; 42 U.S.C. § 1812). But at the same time Congress was careful not to enlarge the penal section (then designated Section 16(b) of the Act) in any way that might seem to authorize criminal enforcement of regulations issued under the new, but vague, delegation of power (S. Rep. 603, 83rd Cong., 1st Sess., p. 4). In presenting the 1953 measure for a floor vote, Senator Hickenlooper, in charge of the measure, emphasized:

> "Since the criminal provisions of the Atomic Energy Act do not apply to infractions of general rules and regulations, this section would not enlarge any powers of the Atomic Energy Commission to issue rules and regulations which would subject violators thereof to criminal punishment" (99 Cong. Rec. 9226, 83rd Cong., 1st Sess.).

In 1954, when the Joint Committee on Atomic Energy was considering measures which evolved into the 1954 Act, a committee print of May 21, 1954 contained a version of the penal section (Section 223) which would punish violations of "any regulation or order prescribed or issued under Sections 65 or 161." In this form, without discriminating among the various subsections of Section 161, it was so broad that it seemed to provide for criminal enforcement of regulations issued under any or all subsections, including the vague catch-all subsection (q). The Department of Justice, however, was alert to the constitutional infirmity that lurked in this version. Mr. Nathan Siegel, of the Department's Office of Legal Counsel, testified before the Joint Committee that:

> "the men who try these cases feel that there would be more teeth in an act and a case is less likely to be re-

versed after conviction if the language is explicit prohibitory language" (Hearings before Joint Comm. on Atomic Energy on S. 3323 and H.R. 8862, 83rd Cong., 2nd Sess., p. 725; see also p. 707).

Mr. J. Lee Rankin, then Assistant Attorney General, testified at p. 726:

> "Section 223 is the same problem in regard to prohibitory language, as well as the sanctions, and we will submit some language in regard to that if you like."

In the version of the penalty Section 223 that was subsequently passed in the Act of 1954, Congress was careful to omit any reference to violations of regulations under the catch-all subsection (q) of Section 161. As to violations of Commission regulations, Congress attached criminal penalties in Section 223 only where the regulation is "issued under section 65 or subsection 161b., i., or p." Thus Congress recognized and sought to avoid the constitutional infirmity of any attempted criminal enforcement of regulations under 161(q).[14] For the Court now to read Section 161(i) in terms as broad as 161(q) would be to nullify the very Congressional restraint evidenced in refusing to place criminal sanctions behind vague statutory authorization.

(ii) *As construed by the Government, Section 161(i) is too vague to sustain the regulation and the criminal conviction below.* Section 161(i), if construed as loosely as the

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[14] In the past, the Commission itself has been sensitive to the constitutional importance of specific legislative authority for any regulation which is to be criminally enforcible. For example, in requesting a clear-cut "trespass" provision with criminal penalties, Commissioner Zuckert pointed out to the Joint Committee in 1954 that "it would be quite useful in furnishing a *sound legal basis* for *prosecuting* trespasses on Commission property in the absence of any Federal trespass statute of general applicability" (emphasis supplied). (Hearings before Joint Comm. on Atomic Energy on S. 3323 and H. R. 8862, 83rd Cong., 2nd Sess., Part 2, p. 611).

Government urges, would be subject to the same basic infirmity as an attempted criminal enforcement of a regulation issued under 161(q). Appellant has shown that, when subclause (3) is considered in its entirety and in the context of the preceding parts of 161(i), the conclusion is inescapable that it has no application whatever to nuclear weapon tests or to citizens such as appellant who are unconnected with any person, activity or facility authorized to partake in the atomic energy program. The Government would apparently have the courts read subclause (3) as if it were dissociated from the rest of 161(i) and, moreover, as if it did not contain the central phrase, "including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity . . ."

So edited, the subclause would permit regulations:

> to govern any activity authorized pursuant to this Act . . . in order to protect health and to minimize danger to life or property."

That the Government reads Section 161(i) as indicated and thus renders it as vague as 161(q) need not be left to speculation. The Government's Memorandum of Points and Authorities in Opposition to Defendant's Motion to Dismiss in the court below contains the following statement (R. 28-29):

> "Thus, the powers granted the Commission to 'prescribe such regulations or orders as it may deem necessary * * * to protect restricted data,' or 'to govern any activity authorized pursuant to this Act * * * in order to protect health and to minimize danger to life or property,' or generally to 'make * * * such rules and regulations as may be necessary to carry out the purposes of this Act' (42 U.S.C. 2201(i) and (q)), all must be read as authorizing regulations equal in reach to the

statutory activities which they implement. A narrower reading would, in fact, contravene the plain language of the cited authorizations." (Omissions are the Government's.)

Even if the provision could be severed and truncated as the Government would have it, the result would not aid the prosecution. For its terms would then be no less vague and indefinite than those of the catch-all Section 161(q). Under the Fifth and Sixth Amendments, no criminal conviction for an alleged violation of a regulation issued under Section 161(i), as construed by the Government, could be constitutionally sustained. It is elementary that a vague and indefinite criminal statute—that is, one under whose terms "men of common intelligence must necessarily guess at its meaning and differ as to its application"—violates the due process clause of the Fifth Amendment and the due notice requirement of the Sixth Amendment. *Lanzetta* v. *New Jersey,* 306 U.S. 451, 453. See also *United States* v. *Cohen Grocery Co.*, 255 U.S. 81; *Connally* v. *General Construction Co.,* 269 U.S. 385; *Herndon* v. *Lowry,* 301 U.S. 242. The fact that the regulation may not of itself be vague and indefinite is no answer to the deficiencies of the statute under which the regulation is promulgated. Appellant may, of course, have been under no misconception as to what was prohibited by the Commission's regulation;[15] he certainly

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[15] Appellant does not claim that the prohibition of April 11, 1958 was itself indefinite, although some parts of the regulation were unquestionably vague and without intelligible standards (e.g., the regulation purported to sub-delegate to unspecified "officials" of the Department of Defense authority to grant or deny entry permission; it set no standards as to who could obtain permission and for what purpose; it provided for no hearing on requests for permission to enter). Appellant's claim is that 161(i), under which the regulation was purportedly issued, does not even remotely suggest any outlines of regulatory power that would encompass the sort of regulation, and along with it the special crime, which the Commission attempted to create.

could not have known from looking at the statute whether it authorized the Commission to issue the contested regulation. Specificity of a regulation cannot cure vagueness in its statutory predicate.

Moreover, all apart from the Fifth and Sixth Amendments and even if a regulation could be deemed to cure statutory vagueness, the vague delegation of criminal regulatory authority raises serious constitutional issues under the doctrine of separation of powers. The delegation to an administrative agency of legislative authority to make conduct criminal must be narrowly circumscribed in scope and with standards adequate to assure that the law-making function has not been surrendered. *Panama Refining Co.* v. *Ryan,* 293 U.S. 388; *Schechter Corp.* v. *United States,* 295 U.S. 495. Particularly where the administrative regulation would create a novel and extraordinary crime, as in this case, the delegation of authority to do so must be clear and definite. In *Fahey* v. *Mallonee,* 332 U.S. 245, involving the question of constitutional vagueness in delegation of administrative regulatory power, Mr. Justice Jackson, speaking for the Court, explained the unconstitutionality of the statutes tested in *Panama Refining Co.* v. *Ryan, supra,* and *Schechter Corp.* v. *United States, supra:*

> "Both cases cited dealt with *delegation of a power to make federal crimes of acts that never had been such before* and to devise novel rules of law in a field in which there had been no settled law or custom. The latter case also involved delegation to private groups as well as to public authorities. Chief Justice Hughes emphasized these features, saying that the Act under examination was not merely to deal with practices 'which offend against existing law, and could be the subject of judicial condemnation without further legislation, or to create administrative machinery for the application of

established principles of law to particular instances of violation. . .' " (p. 249) (emphasis supplied).

And again, distinguishing between administrative power to appoint conservators for federal savings and loan associations and power to create innovations of criminal law, Mr. Justice Jackson wrote (p. 250):

> "It may be that explicit standards in the Home Owners Loan Act would have been a desirable assurance of responsible administration. But the provisions of the statute under attack are not penal provisions as in the case of *Lanzetta* v. *New Jersey,* 306 U.S. 451 or *United States* v. *Cohen Grocery Co.,* 255 U.S. 81. The provisions are regulatory . . . The remedies which are authorized are not new ones *unknown to existing law to be invented by the Board in exercise of a lawless range of power.* Banking is one of the longest regulated and most closely supervised of public callings . . . A discretion to make regulations to guide supervisory action in such matters may be constitutionally permissible while it might *not be allowable to authorize creation of new crimes in uncharted fields*" (emphasis supplied).

We do not urge this Court to hold Section 161(i) unconstitutional. Congress made clear its awareness of constitutional requirements when it refused to place criminal sanctions behind the Commission's general regulatory authority under 161(q). We ask this Court to respect Congressional adherence to constitutional requirements and not read Section 161(i) as covering the same vague ground as 161(q). If, however, the Court should disagree with our conclusion as to Congressional intent and give 161(i) the broad interpretation for which the Government contends,

then clearly, under the authoritative decisions of the Supreme Court previously cited, 161(i) is too vague and indefinite to support appellant's criminal conviction.

III

The Pacific Nuclear Tests and the Regulation Under Which Appellant Was Convicted Violate International Commitments of the United States

In Point I we saw that the language of Section 161(i), the separate "trespass" section, and the administrative interpretations by the Commission, all complemented each other in support of a construction of this section excluding the authority to issue the contested regulation. In Point II we demonstrated that such construction was required because the broad interpretation for which the Government contends would render Section 161(i) too vague and indefinite to support a criminal conviction. We turn now to a third and most significant reason for appellant's construction of the statute—that a contrary construction would ascribe to Congress an intent to abrogate the international commitments of the United States.

It is a settled rule of statutory construction that Congress should not be presumed to have violated the international commitments of the nation whose laws it enacts. See pp. 55 to 58, *infra*. Judicial deference to the good faith of a coordinate branch of government requires that, in the absence of explicit statutory language, Congress will not be deemed to have abrogated our international commitments. In this Point III, we domonstrate first that the Pacific nuclear tests and the contested regulation promulgated in connection with those tests clearly violate the international commitments of the United States (see A, pp. 43 to 55, *infra*) and second that nothing in Section 161(i) or the Atomic Energy Act is sufficiently explicit to

warrant the interpretation that Congress thereby intended to sanction these violations of the international commitments of the United States (see B, pp. 55 to 58, *infra*).

A. *Violations of International Commitments*

The Commission's 1958 nuclear tests in the Pacific constituted a three-fold violation of this country's international commitments: 1) the world-wide contamination resulting from the testing violates this country's human rights commitments under the United Nations Charter; 2) the testing violates obligations undertaken by the United States under the Trusteeship Agreement for the Trust Territory of the Pacific Islands; and 3) the tests and the "trespass" regulation constitute unprecedented infringement of United States commitments to the doctrine of freedom of the seas.

(1) *The Tests Cause World-Wide Contamination Violating Solemn Commitments of the United States under the United Nations Charter*

By ratification of the Charter of the United Nations, the provisions thereof became the supreme law of the land under Article VI of the Constitution. One of the foremost areas in which the Charter of the United Nations imposes obligations upon the member nations is that of human rights. See Lauterpacht, *International Law and Human Rights* (1950); Quincy Wright, *National Courts and Human Rights,* 45 Am. J. Int'l L. 62. Under Article 55 of the Charter, for the purpose of creating "conditions of stability and well-being", member nations are pledged to promote "universal respect for, and observance of, human rights and fundamental freedoms,"[16] and "solutions of international economic, social, health, and related problems."

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[16] See *Oyama* v. *California,* 332 U.S. 633 (concurring opinions at 649-650; 673).

By Article 56 of the Charter, all member nations "pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." As stated on April 18, 1949, by Mr. Benjamin V. Cohen, United States Representative at the Third General Assembly (Department of State Bull. XX, 1949, p. 556), "Under the Charter of the United Nations all the members of the United Nations . . . solemnly committed themselves to take joint and separate action in cooperation with the organization to promote universal respect for and observance of human rights and fundamental freedoms . . ."

The 1958 nuclear tests, which contributed materially to the ever increasing world-wide atomic pollution, are clearly contrary to our commitment to the "observance of human rights and fundamental freedoms."[17] The right to life and

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[17] Apart from the United Nations Charter commitments, atomic pollution may also be viewed as a violation of general international law. As stated by Professor Emanuel Margolis in *The Hydrogen Bomb Experiments and International Law,* 64 Yale L. J. 629, 641-42:

> "The injurious effects of the thermonuclear explosions may be viewed also within the juridical context of the responsibility of states to prevent pollution of international waters and air space. To date, concern over the problem of pollution of international waters has been restricted almost exclusively to pollution from the discharge of oil by ships. And, while international bodies have given the matter increasing attention over the past few decades, and various states have passed legislation aimed at ameliorating its wasteful and unsanitary after-effects, the nations thus far have been unsuccessful in their efforts to regulate pollution by general treaty or convention.
>
> Nevertheless, judicial tribunals have used general principles of law and equity to resolve disputes concerning pollution. Some of the leading cases on the subject are decisions of the United States Supreme Court in disputes between states of the union. In such cases the Court has established the following rule: a state may be enjoined from conduct which pollutes interstate waters, or waters flowing into a neighboring state, if it can be shown that the pollution and its effects are of sufficiently 'serious magnitude.'
>
> This same 'serious magnitude' test was recognized and applied

to a life free from grievous bodily injury and suffering are "human rights" of the first magnitude—there can be no question but that nuclear tests are causing world-wide atomic pollution which threatens the health and the lives of the people of all nations, those now living and generations yet unborn. This is the conclusion not only of scientists testifying at the 1957 hearings of the Joint Congressional Committee on Atomic Energy on "The Nature of Radioactive Fallout and Its Effects on Man," [18] but also of the "Report of the United Nations Scientific Committee on Effects of Atomic Radiation," in August 1958, to the 13th Session of the General Assembly.

The United Nations Report is the result of years of scientific study by United Nations experts on the effects of radiation. The firm conclusion of their study (at pp. 41-42) is that there arises "exposure of mankind to ionizing radiation . . . from environmental contamination due to nuclear explosions"; that "even the smallest amounts of radiation are liable to cause deleterious genetic, and perhaps also somatic, effects"; and that "both natural radiation and radiation from fallout involve the whole world population to a greater or lesser extent . . ." The report points out that:

> "Even a slow rise in the environmental radioactivity in the world, whether from weapon tests or any other

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as a rule of international law by an arbitral tribunal in the *Trail Smelter Case*. The United States received an indemnity award of $78,000 for damages to land, crops, and trees in the state of Washington from sulphur dioxide fumes emitted by a Canadian smelting company. The tribunal ruled that 'no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of *serious consequence* and the injury is established by clear and convincing evidence.' "

[18] See Joint Committee Print, 85th Congress, 1st Sess., "Summary-Analysis of Hearings May 27-29, and June 3-7, 1957 on the Nature of Radioactive Fallout and Its Effects on Man."

> sources, might eventually cause appreciable damage to large populations before it could be definitely identified as due to irradiation. Appearance and elimination of adverse genetic effects would be very slow; and, as the radioactive contamination accumulated, it might so act as to increase the likelihood of somatic injury in individuals due to the additional exposure. Such a situation requires that mankind proceed with great caution in view of a possible underestimation."

The report estimates the number of cases of leukemia which may ultimately occur from accumulated fallout engendered by nuclear testing prior to August, 1958. While doubt concerning the human radioactivity "threshold" precludes a firm minimum figure for leukemia cases, the report indicates that as a cumulative result of the nuclear tests prior to the 1958 tests, *150,000 leukemia cases may ultimately occur.*[19]

On these facts we deem it clear that the 1958 nuclear tests conducted by the Atomic Energy Commission in the Pacific were inconsistent with this country's United Nations commitment of observance of human rights and fundamental freedoms.[20]

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[19] In a study by Edward Teller and Albert L. Latter, *Our Nuclear Future* (1958), p. 119, it is stated that:

> "Per megaton of fission . . . perhaps 200 persons may get leukemia or bone cancer. This figure could actually be higher, possibly even a thousand or more persons per megaton."

Inasmuch as there have to date been 75 megatons of fission by virtue of nuclear detonations, according to Teller and Latter's figures, this means *a potential of 75,000 cases of leukemia or bone cancer as a result of testing to date.* Mr. Teller, of course, is the distinguished Consultant to the Atomic Energy Commission and America's foremost advocate of continued nuclear testing.

[20] In protesting against nuclear testing with its attendant world contamination, appellant shares the views of respected world leaders—those of neutral nations and our close allies—and indeed the 1956 Presidential nominee of the Democratic Party. See Freeman and Yaker, *Disarmament and Atomic Control,* 43 Cornell Law Quarterly 236, 255, n. 76.

(2) *The Removal of the Marshall Islanders and the Destruction of Their Lands and Resources Violate United States Obligations Under the Trusteeship Agreement for the Trust Territory of the Pacific Islands*

As a result of the Second World War, the United States obtained possession of certain islands in the Pacific formerly mandated to Japan. In 1947, the United States submitted to the Security Council of the United Nations, in accordance with Article 83 of the Charter, a proposed Trusteeship Agreement for these islands under which the United States would administer them in accordance with the terms of the Charter. On April 2, 1947, the proposed Trusteeship Agreement was approved by the Security Council. Thereafter, the Senate and the House of Representatives authorized the President of the United States to approve that Trusteeship Agreement on behalf of the United States. H. J. Res. 233, 61 Stat. 397. On July 18, 1947, the President approved the Agreement and it thereby became effective.

Under the Trusteeship Agreement the United States is designated as the administering authority, with full powers of administration, legislation and jurisdiction over the subject Territory. In discharging its obligations under the Agreement, the United States is required to act in accordance with the Charter of the United Nations, promoting development of the inhabitants towards self-government or independence. By the second section of Article 6 of the Agreement, it is decreed that the United States, as the administering authority, shall:

> "Promote the economic advancement and self-sufficiency of the inhabitants, and to this end shall regulate the use of natural resources; encourage the development of fisheries, agriculture, and industries; *protect the inhabitants against the loss of their lands and re-*

sources; and improve the means of transportation and communication'' (emphasis supplied).

It is this section of the Trusteeship Agreement, guaranteeing the protection of the inhabitants against the loss of their lands and resources, which has been most clearly violated by the testing conducted by the Atomic Energy Commission in the Pacific Ocean.[21]

By virtue of the nuclear testing in the Pacific conducted by the Commission between 1946 and 1958, Marshall Islanders have been subjected to the loss of their homes and properties, and indeed, to bodily injury. Prior to the 1946 tests, 160 inhabitants of Bikini, which had been selected as a test site, were removed from the island, placed on Rongerik Atoll, and eventually relocated to Kili Island in the Southern Marshalls.[22] See Navy Department, Trust Terri-

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[21] As stated in the 1953 Annual Report of the High Commissioner of the Trust Territory of the Pacific Islands to the Secretary of the Interior (at p. 1):

> "The Agreement establishes the area as a strategic trusteeship in recognition of those geographic considerations which render its position in the Pacific of vital strategic concern to the United States and to the other nations of the free world in the inhibiting of resurgent aggression. The United States, as administering authority, occupies a privileged strategic position in the islands of the Trust Territory, but in return for that advantage it has voluntarily accepted certain serious obligations for the present and future welfare of the inhabitants."

[22] The Bikini people whose primary occupation was fishing were moved to Kili Island where there is no fishing for seven months of the year. Kili has since been called "the island of hungry people" (New York Times, June 28, 1954, p. 3, col. 5). The 1956 Annual Report of the High Commissioner of the Trust Territory of the Pacific Islands to the Secretary of the Interior discusses the need for

> ". . . assistance in orienting the former Eniwetok and Bikini residents in their respective new home islands of Ujelang and Kili, Marshall Islands District, where fishing and agriculture conditions are different from those to which they had been accustomed. A former district anthropologist for the Marshall Islands returned during the year,

tory of the Pacific Islands, 3 (1948); Petition from the Marshallese People Concerning the Pacific Islands, U. N. Doc. No. T/Pet. 10/28 (1954). Later, in connection with the selection in 1947 of Eniwetok Atoll in the Marshall Islands as an atomic proving ground, 145 inhabitants of that atoll were resettled on Ujelang Atoll. See AEC Press Release No. 70, December 1, 1947. On March 1, 1954, a nuclear detonation exposed 236 Marshallese to radiation and radiation illness on the islands of Rongelap, Rongerik and Utirik. See New York Times, March 12, 1954, p. 1, col. 1. Because Rongelap and Utirik Islands were rendered radioactive, the inhabitants of Utirik were removed temporarily to Kwajalein and the people of Rongelap were transferred to the Island of Ejit on Majuro Atoll. See 1954 Annual Report of the High Commissioner of the Trust Territory of the Pacific Islands to the Secretary of the Interior, p. 8. Thus, since 1946 the Pacific nuclear testing has necessitated the relocation, temporary or permanent, of a total of 541 Marshallese.

It is unnecessary to belabor the fact that the removal of the Marshall Islanders from their homes and properties because of the nuclear testing program is inconsistent with the United States' treaty obligation to "protect the inhabitants against the loss of their lands and resources." [23] Nor, notwithstanding the Government's contention below,

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and gave effective assistance in orienting these people in their new island homes. Among other things, a boat was procured especially for the Kili people, to aid them in carrying on subsistence agriculture at nearby islands" (p. 20).

[23] "Land means a great deal to the Marshallese. It means more than just a place where you can plant your food crops and build your houses; or a place where you can bury your dead. It is the very life of the people. Take away their land and their spirits go also." Petition from the Marshallese People Concerning the Pacific Islands, U. N. Doc. No. T/Pet. 10/28 (1954).

is it of significance that the Trusteeship Council of the United Nations has failed to condemn the tests despite the petition of Marshall Islanders in 1954 and 1956 for cessation of testing.[24] The Trusteeship Council is not authorized either under the Agreement or the United Nations Charter to alter or amend its terms or in any sense to waive a violation thereof.[25] "In carrying out its trusteeship functions, the Trusteeship Council . . . is limited to making recommendations to Members. It does not make binding decisions." Toussaint, *The Trusteeship System of the United Nations*, p. 174. The function of the Trusteeship Council is merely to assist the Security Council in carrying out its functions under the Charter, and this does not include functions regarding the Trust Agreement such as alteration, amendment or termination. *Id.*, p. 172. Only the Security Council can make binding determinations on the administration of a strategic area such as the Pacific Trust Territory. *Id.*, p. 222 *et seq.*

Whether the Trusteeship Council's action upon the request of the Marshall Islanders for discontinuance of the

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[24] See Trusteeship Council Resolution 1082, 15 July 1954; Trusteeship Council Resolution 1493, 29 March 1956. The Government's contention below that these resolutions "expressly approved nuclear tests in the Marshall Islands" (R. 31) would hardly seem justified merely upon the basis of a suggestion from the Trusteeship Council that precautions be taken "if the Administering Authority considers it necessary . . . to conduct further nuclear experiments in the Territory."

[25] The Trust Territory of the Pacific Islands is designated a "strategic area" and, under Article 83 of the United Nations Charter, "All functions of United Nations relating to strategic areas, including the approval of the terms of the trusteeship agreements and of their alteration or amendment, shall be exercised by the Security Council." While it is prescribed that the Security Council shall "avail itself of the assistance of the Trusteeship Council to perform those functions of the United Nations under the trusteeship system relating to political, economic, social and educational matters," this provides no authority for the Trusteeship Council either to approve or disapprove the actions of the administering authority.

tests be interpreted as simply a refusal to condemn the United States tests, or, along the lines of the Government's argument below, be interpreted as an approval of those tests, is of no significance in view of the limited authority of the Trusteeship Council. If the United States has violated its Trusteeship obligations towards the people of the Marshall Islands, as appears abundantly clear from what has been related, the Security Council and the Security Council alone has the power to waive that violation, and the Security Council has not been asked to take action and has taken no action in the matter. Thus, the deprivation of their home lands, to which the Marshall Islanders are subjected by the Pacific tests, is a continuing invasion of rights which the United States is committed to protect under its agreement with the United Nations.

(3) *The Closing Off From Ocean Traffic of 390,000 Square Miles of the Pacific Is a Massive Invasion of the International Freedom of the High Seas Which the United States Is Committed to Respect*

The appropriation, in connection with the Pacific nuclear tests, of 390,000 square miles of the Pacific Ocean and the promulgation of a regulation prohibiting entry into that area constitute a massive invasion of the international freedom of travel on the high seas.[26] Long before the found-

[26] This violation is fully and ably reviewed in two articles, *The Hydrogen Bomb Experiments and International Law*, by Emanuel Margolis, 64 Yale L. J. 629, and *The Hydrogen Bomb Tests in Perspective*, by Myres S. McDougal and Norbert A. Schlei, 64 Yale L. J. 648. It should be noted that, while the latter article generally defends the nuclear tests in the Pacific against claims of international violations, the article was written before the promulgation of the regulation here in issue and *explicitly reserves* the international law issue presented by such a regulation. Thus, the authors conclude, at p. 684, that atomic testing on the high seas by the United States in itself "offers no serious interference with the policies of promoting commercial navigation and fishing which underlie 'freedom of the seas,'" but they are careful to point out that testing alone "does

ing of the Republic, freedom of the seas had become a universally recognized guarantee of international law. See Margolis, *supra,* n. 26 at p. 632 et seq; McDougal and Schlei, *supra,* n. 26, at p. 661 et seq. Numerous declarations of the United States right down to the present time indicate the degree and continuity of its commitment to the principle that the high seas may be freely traversed by all persons without hindrance.

Thus, in the Seventh Principle of the Atlantic Charter of August 14, 1941 (55 Stat. 1603), constituting a declaration of principles between this country and the United Kingdom, the parties declared their commitment to a "peace" which "should enable all men to traverse the high seas and oceans without hindrance." On September 28, 1945 the President of the United States issued Proclamations Nos. 2667 and 2668 (59 Stat. 884 and 885) concerning United States policy "With Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf" and "With Respect to Coastal Fisheries in Certain Areas of the High Seas." In both instances the proclamations specifically stated that by virtue of the matters therein, "the character as high seas" of the areas affected "and the right to their free and unimpeded navigation are in no way thus affected." [27] Indeed, at this very time the United States is predicating its arguments in the United States Supreme Court in the "tidelands" cases upon the traditional recognition and acceptance by the United States

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not offend against the subordinate policies against international friction *which are involved in claims to exercise police powers on the high seas. No ships are seized or condemned, nor is civil or criminal jurisdiction of any kind asserted*" (emphasis supplied).

[27] Early in 1958 Mr. Arthur Dean emphasized the historic commitment of the United States to the principle of freedom of the seas at the Conference on the Law of the Sea convened in Geneva under auspices of the United Nations. A Convention was formulated at this Conference concerning the freedom of the high seas, subject to the ratification of individual nations. See *Foreign Affairs,* October 1958, pp. 82-94.

of the principle that the waters beyond the three-mile limit are international in character. In the Brief for the United States in *United States* v. *Louisiana, Texas, Mississippi, Alabama and Florida,* No. 11, Original, Supreme Court of the United States, October Term, 1957, there is extensive documentation (pp. 59-102) of the historic commitment of the United States to the principle of freedom of the seas beyond the three-mile limit. In the words of the Solicitor General (p. 59):

> "The concept of the marginal belt of territorial water, subject to the sovereignty of a coastal nation, is an encroachment upon the general principle of freedom of the seas. Being firmly committed to freedom of the seas as a major premise of national policy (*United States* v. *California,* 332 U.S. 19, 34), the United States has always insisted that the width of the marginal belt of territorial waters which it would claim for itself or recognize for other nations must be held to a minimum."

In the words of Secretary of State Dulles, whose declarations the Solicitor General urges as binding upon the Supreme Court in the tidelands litigation:

> "From the outset, it [the United States] had adopted freedom of the seas as an axiom of its foreign policy. It rapidly perceived that, in order to give maximum effect to this policy, it must adhere strictly to the three-mile limit . . .
>
> "Freedom of the seas continues to be essential to the national interests of the United States, particularly in matters of commerce, fishing and defense. Free sea lanes and air routes over the seas are essential to the maintenance of the pre-eminence of the United States in commercial shipping and air transport. Free seas

are essential to the prosperity of its fishing industry. And it is its traditional concept of defense that the greater the freedom and the range of its warships and aircraft, the more effectively its security interests are protected. Compromise of the position of the United States on the three-mile limit would necessarily compromise, if not force abandonment, of its opposition to claims of foreign states to greater breadths of territorial waters, and in turn impair the protection of national interests which the policy of freedom of the seas is designed to achieve. It is no exaggeration to say that, in view of the serious attacks which are now being made upon the freedom of the seas in various parts of the world, the maintenance of the traditional three-mile policy is more than ever a matter of vital interest to the United States'' (Brief, pp. 345-346).

In the light of these declarations, it is incontestable that the United States has always been and remains today fully committed to the principle of the freedom of the high seas. Yet it can hardly be questioned that the appropriation for testing of a 390,000 square mile area of the Pacific Ocean, and the promulgation of a regulation prohibiting entry, is a massive intrusion upon the right of ''all men to traverse the high seas and oceans without hindrance.'' Indeed, the obvious nature of the violation is evidenced by the statement of the United States on November 12, 1952 (see 99 Cong. Rec. 4084-4085) protesting the claim of the Russian government asserting jurisdiction over a 12 nautical mile off-shore belt of waters:

''It is the view of my Government that the Soviet Union, in thus attempting to appropriate to its exclusive use and control a portion of the high seas, has manifested a willingness to deprive other states, with-

> out their consent, of rights under international law. Such conclusion is inescapable in the face of a territorial-waters policy whereunder the Soviet Union would supplant free and untrammeled navigation by all vessels and aircraft over water areas comprising a part of the high seas, with such controls as that Government might apply. The Government of the United States of America is not aware of any principle of international law which would support and justify such a policy."

If this be the correct view under international law of the appropriation of a 12 mile off-shore area by another nation, we would think that the same considerations would apply with no less vigor to the exclusive appropriation by an agency of the United States of over 390,000 square miles of the high seas.

B. *Nothing in the Atomic Energy Act Sufficiently Evidences Congressional Intent to Violate International Commitments so as to Authorize the Pacific Nuclear Tests and the Contested Regulation*

It is firmly settled that, in the absence of explicit statutory language, Congress will not be presumed to have authorized the abrogation of international commitments of the United States. The repeal of an international commitment requires an explicit statutory provision whether the commitment be under recognized international law (see *Murray* v. *Charming Betsy,* 2 Cranch 64, 118) or treaty (see *United States* v. *Payne,* 264 U.S. 446; *United States* v. *Lee Yen Tai,* 185 U.S. 213; *United States* v. *Gue Lim,* 176 U.S. 459).[28] The courts will not lightly assume that Congress has ef-

[28] In the absence of explicit authorization for the testing and the regulation, the Government may seek to rely upon congressional "ratification" of the Pacific tests by appropriations with knowledge of the tests;

fected a unilateral renunciation of solemn international obligations undertaken by the United States.

As the Supreme Court held in *Cook* v. *United States,* 288 U.S. 102, 120:

> "A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed. *Chew Heong* v. *United States,* 112 U.S. 536; *United States* v. *Payne,* 264 U.S. 446, 448."

Eloquent exposition of the rationale for the established rule appears in the opinion of the Supreme Court by Mr. Justice Harlan in *Chew Heong* v. *United States,* 112 U.S. 536:

> "The court should be slow to assume that Congress intended to violate the stipulations of a Treaty, so recently made with the government of another country . . . Aside from the duty imposed by the Constitution to respect treaty stipulations when they become the subject of judicial proceedings, the court cannot be unmindful of the fact, that the honor of the government and the people of the United States is involved in every

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such an attempt, however, is precluded not only by the rule against implicit abrogation of treaty commitments but by the general presumption against implicit ratification. Thus, because congressional reenactment of ambiguous language is "an unreliable indicium at best" (*Commissioner* v. *Glenshaw Glass Co.* 348 U.S. 426; *Helvering* v. *Wilshire Oil Co.,* 308 U.S. 90), implicit ratification is rejected when statutory language is "wanting in that certainty and evident purpose which would justify acceptance as a legislative declaration". *Haggar Co.* v. *Helvering,* 308 U.S. 389, 400. Only recently in *Peters* v. *Hobby,* 349 U.S. 331, the Supreme Court rejected Presidential "ratification" of authority not explicitly granted by the President in an executive order. Moreover, the presumption against ratification is especially strong in the atomic energy area, where Congress has continuously revised a complex and detailed series of governing laws with ample opportunity to make explicit what has been authorized. See *Addison* v. *Holly Hill Co.,* 322 U.S. 607, 617.

inquiry whether rights secured by such stipulations shall be recognized and protected. And it would be wanting in proper respect for the intelligence and patriotism of a co-ordinate department of the government were it to doubt, for a moment, that these considerations were present in the minds of its members when the legislation in question was enacted."

Certainly, in the absence of an explicit Congressional declaration, every presumption should be indulged against finding within the Atomic Energy Act authorization for prohibitory regulations incidental to nuclear tests which subject the population of the world to radiation-induced illness,[29] which violate our treaty commitments to the Marshall Islanders and which entail massive infringement upon the freedom of the high seas. Not only does the Atomic Energy Act lack such *explicit* authorization of nuclear tests in the Pacific as might be construed to override the solemn international commitments involved, but, as we have seen (Point I, *supra*), Section 161(i) does not even *implicitly* authorize the contested regulation. In these circumstances this Court cannot find within the Atomic Energy Act the explicit statutory language requisite to the

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[29] In this respect, the 1956 observations of the United States District Court in Utah in *Bulloch* v. *United States*, 145 F. Supp. 824, 826, are pertinent:

"Not unmindful of the vital importance of nuclear experimentation to the welfare and safety of our country, there yet has been established nothing here that would justify the intentional or negligent endangering of lives or property in the course of the tests. To seek to do so would seem to compromise fundamental human rights for the protection of which our governmental policy is designed. Indeed, while reluctant to broadly concede the point, it was not disputed by counsel for the Government that its responsibility was to so conduct the tests as not to intentionally, wantonly, or negligently endanger human life or private property. Certainly, there was no evidence from which it might be inferred that to do so was within the discretion vested in any officer or agent of the United States."

further finding of a Congressional intent to violate the international commitments of the United States. The absence of such language in Section 161(i) or indeed in any other provision of the Atomic Energy Act provides a most important argument for the construction of Section 161(i) which appellant urges upon this Court.[30]

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[30] There are so many reasons for the Court to interpret Section 161(i) to exclude the contested regulation that we are relegating the "presumption against extraterritoriality" to this footnote. It is a well established rule of statutory construction that, "unless the contrary intent appears," a statute is to be construed presumptively to apply only within the territorial jurisdiction of the United States. *Blackmer* v. *United States*, 284 U.S. 421, 437; *American Banana Co.* v. *United Fruit Co.*, 213 U.S. 347, 357; *Foley Bros.* v. *Filardo*, 336 U.S. 281. Far from a contrary intent appearing here, Congress explicitly provided for activities outside the United States when it so intended.

Moreover, movement and travel of citizens beyond the United States is a matter within the special concern of the Department of State (see e.g., 44 Stat., 887; 22 U. S. C. 211a). Had Congress intended to authorize any unusual restrictions in this field, it is unlikely that it would have done so without obtaining an expression of views from the Department of State. Yet the legislative history of the Act is barren of any evidence that the Department of State was consulted in this regard. Similarly Congress would hardly have delegated authority to the Atomic Energy Commission to restrict travel on the high seas without involving the Department of State in such regulations. In other matters involving special competence of related Government agencies, the Atomic Energy Act is usually careful to provide for their participation. For example: Department of Defense, Secs. 27, 91, 123, 142-144 (42 U.S.C. 2037, 2121, 2153, 2162-2164); Attorney General, Secs. 105, 174, 221 (42 U.S.C. 2135, 2224, 2271); Federal Bureau of Investigation, Secs. 145, 221 (42 U.S.C. 2165, 2271); Civil Service Commission, Sec. 145 (42 U.S.C. 2165); Director of Central Intelligence, Sec. 142e (42 U.S.C. 2162e); Comptroller General, Sec. 166 (42 U.S.C. 2206); Commissioner of Patents, Secs. 151-152 (42 U.S.C. 2181-2182). Yet the Act is silent as to any participation by the Department of State in regard to the regulatory functions of the Commission. We submit, Section 161(i) gave the Commission no power to prohibit extraterritorial navigation on the high seas.

IV

Appellant Was Deprived of First and Fifth Amendment Rights Under the Commission Regulation Which Restrains Peaceable Protest and Freedom of Movement and Which Was Adopted Without the Requisite Notice and Opportunity for Hearing

Beginning in 1946 and continuing through October 1958, when the United States suspended nuclear testing under a voluntary undertaking, the Atomic Energy Commission conducted tests of atomic and hydrogen weapons in the Pacific Ocean. Prior to 1958 travellers by sea or air were warned of the specific "Danger Area" by publication of Notices to Mariners by the U. S. Navy Hydrographic Office in advance of each nuclear test. At no time between the initiation of the tests in 1946 and the promulgation of the contested regulation of April 11, 1958 did the Commission or any other governmental body exercise or even assert authority to enforce exclusion from the test area by criminal regulation or by criminal prosecution.

On September 15, 1957, the Atomic Energy Commission announced a new series of Pacific nuclear tests to begin in April, 1958. Early in January, 1958, the Commission received a notification from certain persons that they intended to sail their ketch, the "Golden Rule," into the danger area as a protest against the tests. On March 25, 1958, the "Golden Rule" sailed from California for Hawaii en route to carry out the announced protest. Notwithstanding the fact that the Commission had known since early January of the intention to sail the Golden Rule into the test area, the Commission took no public measures until the eve of the tests when, on April 11, it promulgated the regulation in question (23 F.R. 2401). In so doing, the Commission stated that the "customary" notice and opportunity for

hearing provided by the Administrative Procedure Act had not been followed because of the imminence of the test series.

On the basis of these facts, most of which appear in the affidavit of April 22, 1958 of Kenneth E. Fields, General Manager of the Atomic Energy Commission (see n. 1, p. 4, *supra*), it is quite clear that the contested regulation was prompted by and directed solely towards the crew of the "Golden Rule" and any others who might contemplate travel into the danger area as a means of public protest against testing. Indeed, appellant's counsel, in arguing in the District Court for a judgment of acquittal or a new trial, offered to prove at any such new trial that the regulation which appellant violated "was aimed solely at the 'Golden Rule' " and that the Commission issued the regulation "without a hearing at the last minute in order to avoid one" (R. 358).

Under these circumstances, appellant's conviction and sentence for violation of the regulation infringed First and Fifth Amendment liberties in both substantive and procedural respects.

A. *Freedom of Protest and Freedom of Movement*

The contested regulation trenches upon fundamental freedoms protected by the First and Fifth Amendments. Freedom of protest lies, of course, at the very heart of the First Amendment guarantees of speech and petition. Freedom of movement is equally protected against governmental infringement by the due process guarantee of the Fifth Amendment.

Long ago the Supreme Court said in *Williams* v. *Fears*, 179 U.S. 270, 274: "Undoubtedly, the right of locomotion, the right to remove from one place to another according to

inclination, is an attribute of personal liberty." And the Court most recently had occasion to examine and apply this "personal liberty" in *Kent* v. *Dulles,* 357 U.S. 116, where the Court stated (at pp. 125-126):

> "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without due process of law under the Fifth Amendment. So much is conceded by the Solicitor General. In Anglo-Saxon law that right was emerging at least as early as the Magna Carta. Chafee, Three Human Rights in the Constitution of 1787 (1956), 171-181, 187 *et seq.,* shows how deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values. See *Crandall* v. *Nevada,* 6 Wall. 35, 44; *Williams* v. *Fears,* 179 U.S. 270, 274; *Edwards* v. *California,* 314 U.S. 160."

Clearly, freedom of movement is a liberty protected by the Fifth Amendment. If necessary, we would urge in the instant case that the contested regulation violates that freedom, particularly because it constitutes a deliberate restriction by the Commission upon the right of a small group of protestors to sail the high seas, assuming the risk to themselves of contamination danger. But, as in the *Kent* case, it is unnecessary to "decide the extent to which it [freedom of travel] can be curtailed." In *Kent* the Court applied the familiar rule of avoidance of constitutional questions and found that the criteria employed by the

State Department in denying passports lacked Congressional authorization. The Court concluded (pp. 129-130):

> "Where activities or enjoyment, natural and often necessary to the well-being of an American citizen, such as travel, are involved, we will construe narrowly all delegated powers that curtail or dilute them. See *Ex parte Endo,* 323 U.S. 283, 301-302. Cf. *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146, 156; *United States* v. *Rumely,* 345 U.S. 41, 46 . . . we deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress by § 1185 and § 211a had given the Secretary authority to withhold passports to citizens because of their beliefs or associations. Congress has made no such provision in explicit terms; and absent one, the Secretary may not employ that standard to restrict the citizens' right of free movement."

The rule of avoidance of constitutional issues is doubly applicable here, for the Commission's regulation infringes upon appellant's freedom of protest under the First Amendment as directly as it does upon his freedom of movement under the Fifth. Freedom of protest is not an empty right to be exercised by ineffective intellectual conversation only; it is a substantial right that may be exercised in its most dramatic and attention-getting manner. *Cantwell* v. *Connecticut*, 310 U.S. 296, 309; *Saia* v. *New York*, 334 U.S. 558; *Terminello* v. *Chicago*, 337 U.S. 1. It was a dramatic, but not impermissible, form of protest for an American scientist to sail into the atomic fallout area to emphasize to the world at large the depth of his conviction by undertaking danger to himself and his family.

Moreover, the Commission had one purpose and one pur-

pose only behind its regulation—to prevent the very type of protest appellant sought to make. Protestors were not excluded from the testing zone in order to protect restricted information; official Russian and other hostile observers were permitted hospitable entry and, indeed, the Government no longer presses any such justification for the regulation. Finally, not only was the regulation intended to prevent protest by entry into the danger zone, but the manner in which the regulation was promulgated without notice or hearing further evidences the Commission's basic intent to avoid protest against its nuclear testing, whether on the high seas or at a hearing in Washington. We turn now to this latter aspect.

B. *Refusal of Notice and Hearing*

Although three months had intervened between the time it first learned that certain persons intended to sail into the danger area and the date when it issued its regulation,[31] the Commission nevertheless refused to provide public notice or opportunity for hearing before promulgating the regulation. Certainly the Commission's assertion of lack of time as ground for this unusual omission is of no avail, for where the Constitution demands opportunity for notice and hearing before agency action, the agency is not at liberty to wait until the last moment to announce that lack of time precludes such opportunity. If this were permissible, the

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[31] "Early in January, 1958, the Atomic Energy Commission received a copy of a letter dated January 8, 1958 addressed to the President, from the Committee for Non-Violent Action Against Nuclear Weapons. This letter informed the President that four members of the Committee planned to sail a 30-foot ketch into the Danger Area, to be designated by the Commission, in protest of the HARDTACK nuclear test series." April 22, 1958 affidavit (p. 2) of Kenneth E. Fields, General Manager of the Atomic Energy Commission, attached to the Opposition by the United States in the Supreme Court to an application for stay in the October 1957 Term in *Bigelow, et al.* v. *United States* (see n. 1, p. 4, *supra*).

constitutional requirement of notice and hearing could be rendered a nullity in every instance. The only question, therefore, is whether due process guarantees were applicable, requiring the Atomic Energy Commission to provide public notice and opportunity for hearing upon its proposed regulation.[32]

Notwithstanding the oft-quoted statement in *Bi-Metallic Co.* v. *Colorado,* 239 U.S. 441, concerning notice and hearing in administrative agency exercise of "legislative" as distinct from "adjudicatory" power, it is clear that the Fifth Amendment's notice and hearing requirements have applicability to the rule-making functions of administrative agencies. Thus where a rule affects a particular identifiable group as distinct from the public at large, the constitutional requirement of notice and hearing has been held to apply. See *Londoner* v. *Denver,* 210 U.S. 373; *Morgan* v. *United States,* 304 U.S. 1, 14-15; *Opp Cotton Mills* v. *Administrator,* 312 U.S. 126, 152-3; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123; *Philadelphia Co.* v. *SEC,* 175 F.

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[32] The Senate Committee Report accompanying the Bill which became the Atomic Energy Act of 1954 (S. Rep. No. 1699, 83 Cong., 2d Sess.) discusses the Administrative Procedure Act, which was made applicable to the Atomic Energy Commission by the Act. The Committee stated at p. 28 that *"The Commission is required to grant a hearing to any party materially interested in any agency action."* Appellant therefore urged below that the Administrative Procedure Act (5 U.S.C. 1003) required opportunity for notice and hearing before promulgation of the regulation (R. 23, 355). While a ruling to this effect would of course avoid the necessity of a constitutional decision, appellant has, in light of the Government's assertions that the Act's military escape clause applies in the instant case, directed his argument primarily to the constitutional question. We do not, of course, concur with the Government's suggestion that the Administrative Procedure Act's military exception can be applied to the instant regulation. If the military exception applies here, it would probably be equally applicable to almost every action of the Commission and would thus defeat the stated congressional intent that that Act's provisions apply to grant a hearing "to any party materially interested" in the Commission's action.

2d 808. The critical distinction to be found in these and other Supreme Court decisions on this subject is the "particularity of application" of the administrative rule in question. See Schwartz, *Procedural Due Process in Federal Administrative Law,* 25 N.Y.U.L. Rev. 552; Nutting, *Adjudicative Procedure in Ad Hoc Rule-Making,* 10 U. Pitt. L. Rev. 155; Fuchs, *Constitutional Implications of the Opp Cotton Mills Case with Respect to Procedure and Judicial Review in Administrative Rule-Making,* 27 Wash. U.L.Q. 1, 8, 20; cf. Davis, *The Requirement of Opportunity to Be Heard in the Administrative Process,* 51 Yale L. J. 1093, 1117. Professor Schwartz in his treatment of the subject at 25 N.Y.U.L. Rev. 563, concludes:

> "The key element in determining whether notice and hearing need be given prior to the exercise of a delegated legislative function is that of applicability. If the rule involved is particular in its applicability, those affected have a right to be heard prior to its promulgation. Even if the administrative function involved is considered legislative in nature, because of the immediate effect upon particular persons, it must be exercised in accordance with the procedural safeguards . . ."

If "particularity of application" is the test, and we submit that it is, the regulation at issue falls clearly within that test. The Commission was fully aware when it issued the regulation and in the months earlier when it had the regulation under consideration (R. 358-359), that a mere handful of people were affected by it, to wit, those few persons willing to undertake radiation risk to themselves in order to dramatize their protest against testing. In these circumstances the opportunity for hearing would hardly be exercised by more than a handful of persons.

We cannot conceive of a regulation more particular in its application to a small and easily identifiable group.[33]

Moreover, in light of the Commission's knowledge that its regulation had immediate impact only upon a handful of persons, the Commission is not entitled to the presumption that its promulgation of the regulation exercised a "legislative" rather than an "adjudicatory" function. On the contrary, where, as here, a regulation affects the interests of a single group or entity, the agency's designation of its action as rule-making rather than adjudication has been disregarded and the constitutional requirements of notice and hearing for agency "adjudication" have been held fully applicable.

In *Philadelphia Company* v. *SEC,* 164 F. 2d 889, 175 F. 2d 808, *cert. denied,* 333 U.S. 828, the Securities and Exchange Commission had withdrawn by rule-making a general exemption formerly afforded by its regulations, with the knowledge that a particular company was the single concern then adversely affected by its action. Under these circumstances the Court of Appeals for the District of Columbia Circuit found that the SEC was not entitled to claim that its rule-making had been mere general reg-

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[33] While it is unnecessary, of course, to demonstrate that compliance with the constitutional notice and hearing requirement would have produced a result contrary from that achieved without such notice and hearing, we must point out the substantial likelihood of such a result. As we have previously shown, the purported statutory authority for the regulation was woefully inadequate to support it. A presentation of this point alone might have led the Commission to abandon the proposed regulation, or to seek to bring the regulation within the "trespass" section of the Atomic Energy Act with its more limited penalties or to seek more adequate and specific Congressional authority. Furthermore, inasmuch as the Commission's primary concern was to avoid public protest at a time when public tolerance of world contamination was rapidly being replaced by public apprehension that testing may have gone too far (R. 356-359), the Commission might well have refrained from promulgating the regulation at all had it been required to provide notice and hearing in advance thereof.

ulation and held that the rule promulgated had such "adjudicatory" applicability as to demand observance of constitutional notice and hearing requirements (175 F. 2d at 816-817):

> "We think the order of the Commission revoking the exemption theretofore afforded Pittsburgh by Rule U-49 (*c*) was invalid for lack of an adequate hearing, including improper allocation of the burden of proof. It is elementary that the action of an administrative tribunal is adjudicatory in character if it is particular and immediate, rather than, as in the case of legislative or rule making action, general and future in effect. *Prentis* v. *Atlantic Coast Line,* 1908, 211 U.S. 210; *Louisville & Nashville R. Co.* v. *Garrett,* 1913, 231 U.S. 298; 42 Am. Jur., Public Administrative Law, §§ 38-40. Within this definition the Commission's order of revocation of Rule U-49 (*c*) is adjudicatory as to Pittsburgh. It is particular, i.e., it applies to the Pittsburgh reorganization alone—so much the Commission admits, as appears in the foregoing statement of facts; and it is immediate in its operation . . . It is elementary also in our system of law that adjudicatory action cannot be validly taken by any tribunal, whether judicial or administrative, except upon a hearing wherein each party shall have opportunity to know of the claims of his opponent, to hear the evidence introduced against him, to cross-examine witnesses, to introduce evidence in his own behalf, and to make argument. This is a requirement of the due process clause of the Fifth Amendment of the Constitution. The applicability of this clause to the quasi-judicial proceedings of an administrative agency is recognized in *L. B. Wilson, Inc.* v. *Federal Communications Commission,* 1948, 84 U.S. App. D.C. —, 170 F.

2d 793, citing, among other authorities, *Londoner* v. *Denver,* 1908, 210 U.S. 373; *Radio Commission* v. *Nelson Bros. Co.,* 1933, 289 U.S. 266; and *Morgan* v. *United States,* 1938, 304 U.S. 1."

Thus, the Commission's failure to afford the few persons affected by its proposed regulation an opportunity to be heard prior to its promulgation renders the regulation defective under the due process guarantee of the Fifth Amendment and appellant's conviction erroneous.

V

Appellant Was Denied His Right Under the Sixth Amendment to Be Defended by His Chosen Counsel

It was appellant's right under the Sixth Amendment to the Constitution to be defended at his trial by counsel of his choice.[34] The record is clear that he was arbitrarily denied that right.

Appellant was arrested on the high seas and shortly thereafter was taken before the United States Commissioner at Hawaii. At his appearance before the Commissioner on July 8, 1958, appellant "announced that he intended to retain a mainland attorney" for his defense (R. 320). A few days later, since he was immediately confronted with the prospect of indictment and criminal proceedings, appellant retained a local counsel, Mr. Katsugo Miho, not to undertake the defense of any subsequent criminal action, but only to handle preliminary matters until appellant could

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[34] The Sixth Amendment's guarantee of "assistance of counsel" affords the right not merely to *an* attorney but to *the* counsel of defendant's choice. *House* v. *Mayo,* 324 U.S. 42, 45-46; *Glasser* v. *United States,* 315 U.S. 60, 75; *Chandler* v. *Fretag,* 348 U.S. 3, 9; *Powell* v. *Alabama,* 287 U.S. 45, 53, 68-9, 71.

obtain mainland counsel qualified to handle a case involving statutory and constitutional issues of the first magnitude (R. 320).

During the following fortnight Mr. Miho represented the appellant on July 21 in District Court proceedings involving waiver of indictment (R. 5-10) and on July 22 on appellant's request to go to Kwajalein to bring the Phoenix back to Hawaii (R. 11-20). During this time, however, appellant was already seeking mainland counsel. Appellant cabled Adlai Stevenson in Moscow requesting him to undertake the defense, but Mr. Stevenson "replied that he was not able to accept the . . . case" (R. 311). On July 28 Mr. Miho and appellant appeared before the District Judge with a request, which was granted, that appellant be permitted to come to the States to seek mainland counsel and financial assistance in connection with his defense (R. 42-48). On July 30 appellant met in the District of Columbia with Mr. Joseph L. Rauh, Jr. (R. 321), and on August 1, he tentatively obtained Mr. Rauh's consent to represent him (R. 321).

August 6 was the date which had been set for argument on the Motion to Dismiss, which had been filed by Mr. Miho before appellant left on his trip to the mainland (R. 322). As soon as appellant returned to Honolulu on August 3, appellant asked Mr. Miho to obtain a continuance of the Motion to Dismiss so that he could finalize his retention of Mr. Rauh and Mr. Rauh could take over the argument on that Motion and conduct the trial (R. 322). Pursuant to this conversation, Mr. Miho contacted the office of the United States Attorney and obtained an agreement to postpone for one month the hearing on the Motion to Dismiss (R. 322). However, the District Judge, on August 5 (R. 322, 413), refused to grant the continuance

despite the Government's acquiescence.[35] Despite the fact that Mr. Miho did not have time to prepare to argue the Motion to Dismiss and had never been retained for that purpose, appellant nevertheless felt constrained to allow Mr. Miho to argue the Motion in deference to the Court's action and on the information that the matters involved in the Motion could be raised again at the trial by Mr. Rauh (R. 322). The Motion was denied from the bench on August 6 without even hearing Government counsel (R. 87).

On the morning of August 11 appellant telephoned Mr. Rauh who agreed to represent appellant at the trial (R. 323). Mr. Rauh pointed out that his first free week without other prior commitments was the week of September 22; since travel to and from Hawaii, preparation and trial would take at least a week, the week of September 22nd was the earliest time he could represent appellant at the trial of the case (R. 323). That afternoon, Mr. Miho requested the District Judge to set the trial for the week of

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[35] This Court may wonder why the District Judge refused such a reasonable request for continuance in the face of both the Government's acquiescence and appellant's own earlier action in expediting the proceedings by "several months" (R. 321) by waiving grand jury indictment. The only explanation we can offer the Court is that the United States Attorney's acquiescence in appellant's request for delay appeared in a Honolulu newspaper prior to counsel presenting the request and acquiescence to the Court (R. 322), thus apparently exacerbating a long-standing feud between the United States Attorney and the Judge in which appellant was an innocent bystander. See *Honolulu Advertiser*, Friday, September 26, 1958, p. 4. We do not believe that either the United States Attorney or the District Judge would question the existence of this long-standing animus. Indeed, it was obviously to this feud that the representative of the Department of Justice referred when he informed Mr. Rauh just before the trial, in response to Mr. Rauh's request for assistance in obtaining a continuance, "We have no objection to the continuance. The Judge is objecting to the continuance . . ." and then remarked about the District Judge's "relationship to the United States Attorney" (R. 403-404).

September 22 on the above ground and others (R. 323). The District Judge refused this request which would have enabled Mr. Rauh to represent appellant; he set the case for trial on August 25th (R. 128), notwithstanding that appellant's waiver of grand jury indictment had already expedited his case by "several months" (R. 321), that the Government had not requested speed (R. 320, 322, 403-404), and that the date set actually resulted in an exceptionally brief period before trial.[36] In refusing a postponement to permit Mr. Rauh's presence at the trial, the Judge erroneously asserted that appellant had "chosen" Mr. Miho as his counsel (R. 114) and then concluded that the Sixth Amendment gave appellant the right to one counsel only[37] (R. 114, 128). The Judge was apparently influenced by his belief that this was nothing more than, in the words of Government counsel, "a traffic case" (R. 117); as far as expert counsel being required to handle the complicated statutory, constitutional and international issues involved, the

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[36] With but a single exception, where no postponement was requested (Case No. 11236, *United States* v. *Hieda*), of the indictments and informations filed in the United States District Court for the District of Hawaii between March and September of 1958, the shortest period between the filing of the information or indictment and the trial occurred in the case at bar.

[37] The Judge's view that appellant had no Sixth Amendment right to two attorneys is erroneous. Clearly, in addition to local counsel, appellant had the right to retain an expert counsel out of the jurisdiction for his defense (see *United States* v. *Bergamo*, 154 F. 2d 31). Equally clearly, exercise of that right did not require him to forego the advice and assistance of local counsel with respect to local procedural matters. The Sixth Amendment is not met merely by the presence of a lawyer, but requires the effective assistance of counsel. See *Glasser* v. *United States*, 315 U.S. 60, 76. In the instant case, effective assistance required a local counsel in addition to an out-of-state expert. We do not, however, rely upon appellant's right to two attorneys for, as the record demonstrates, Mr. Miho had never been chosen by appellant as an attorney to defend him at the trial, and had actually been dismissed even as local counsel prior to trial, undeniably leaving Mr. Rauh as the only counsel of appellant's choice in the case.

Judge simply said that these issues "have already arisen and have been disposed of" (R. 128).[38]

On August 20, the District Judge again refused a requested continuance until September 22 to permit Mr. Rauh's presence at the trial (R. 139-154). The Judge made this denial in the face of Mr. Miho's representation to him that "it was understood and our agreement was that inasmuch as there would be a lapse of time until he was able to get a mainland attorney, that he would retain my services until such time as he could obtain the mainland attorney and to take care of whatever preliminary needs that may be necessary until such time" (R. 147). Again the Judge was influenced by the erroneous and irrelevant observation that "this is not a case of any tremendous size or importance, despite the efforts to make it so" (R. 150).

On August 21, since appellant had never hired or desired Mr. Miho as his defense counsel for trial, appellant severed the attorney-client relationship with Mr. Miho, dismissing him from any further legal duties on his behalf (R. 155) and Mr. Miho filed his withdrawal as counsed (R. 156). Nevertheless, at a further hearing before the District Judge on August 23 (R. 157-173), despite the fact that the record once again clearly showed that Mr. Miho had never been retained as trial counsel (R. 161), that appellant had discharged Mr. Miho, and that appellant explicitly requested in open court that he be permitted to defend himself rather than to have Mr. Miho represent him (R. 160-162),

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[38] The Judge was clearly wrong in saying that all these issues had arisen and been disposed of in the denial of the Motion to Dismiss. Actually, Mr. Miho had not raised the all-important issue of the construction of Section 161(i) in his Motion to Dismiss (R. 21), but rather, as the Government sharply pointed out below (R. 37), had really just repeated the arguments in the Golden Rule case. Furthermore, as far as concerns the issues that were raised by the Motion to Dismiss, certainly appellant had a right at the trial to go into the *facts* on these points which could not be done on the Motion (see R. 379-382).

the District Judge ordered Mr. Miho to represent appellant and denied Mr. Reynolds the right to proceed *in propria persona* (R. 167-172).

At the trial which took place on August 25 and 26 (R. 174-302), Mr. Miho performed defense duties under protest (R. 176-185) and the District Judge consistently refused appellant's requests even to address the Court (R. 177, 178-180, 183, 185, 202, 280). After a perfunctory trial at which Mr. Miho raised none of the statutory, constitutional or international issues presented in this brief (see n. 38, p. 72, *supra*) and undertook all of his responsibilities without consent of, or consultation with, the defendant (R. 177),[39] appellant was convicted (R. 299).

On September 2, 1958, Mr. Miho filed a "Motion for a Judgment of Acquittal or in the Alternative Motion for a New Trial" (R. 304). This motion came on for hearing on September 25th, the date originally requested for the trial. Mr. Rauh appeared before the District Court to urge a new trial on the ground, among others, that appellant had been denied the right to be defended by counsel of his choice (R. 372). The motion was denied (R. 411).

On these facts there can be no doubt whatsoever that (1) Mr. Joseph L. Rauh, Jr., was the only counsel appellant had chosen to undertake his defense at the trial; (2) appellant was denied his right to be defended by Mr. Rauh; and (3) when that right was finally denied, the District Court would not even allow appellant to represent himself but forced upon him counsel he had never hired for the trial and did not desire for that purpose. Under these circumstances, appellant's Sixth Amendment rights were clearly violated.

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[39] That Mr. Miho "represented" the District Judge rather than appellant is evident from the Judge's action in directing Mr. Miho that he did "not have to take any orders from the defendant regarding how you as an attorney shall conduct his case" (R. 185).

The Sixth Amendment guarantees a criminal defendant the right to be defended not merely by *an* attorney but by *the counsel of his choice. House* v. *Mayo,* 324 U.S. 42, 45-46; *Glasser* v. *United States,* 315 U.S. 60, 75; *Chandler* v. *Fretag,* 348 U.S. 3, 9; *Powell* v. *Alabama,* 287 U.S. 45, 53, 68-9, 71. When a defendant has made that choice, he is entitled to have chosen counsel represent him, and for that right the Court may not substitute some other counsel not so chosen, even if the alternative counsel be an attorney *associated* with the chosen counsel (*United States* v. *Koplin,* 227 F. 2d 80, (C.A. 7)), defendant's chosen *local* counsel *(United States* v. *Bergamo,* 154 F. 2d 31 (C.A. 3)), or counsel *formerly* chosen by a defendant whom he no longer desires (*Wilfong* v. *Johnston,* 156 F. 2d 507 (C.A. 9); *Lee* v. *United States,* 235 F. 2d 219 (C.A.D.C.)).

As the record shows and *as the Court was clearly informed prior to trial,*[40] Mr. Miho, whom the Court ordered to defend appellant at the trial, had never been retained by appellant for that purpose and had previously been dismissed as his attorney for any purpose whatsoever. His "representation" of appellant at the trial therefore clearly did not meet the Sixth Amendment's requirement of effective assistance of counsel nor the Sixth Amendment's guarantee of assistance of chosen counsel.

Of course, a defendant may not by insisting upon representation by counsel of his choice, demand unlimited post-

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[40] The Judge relied heavily upon the fact that Mr. Miho had entered a general appearance (R. 310). There is nothing in the record to indicate that this is not the accepted practice in the United States District Court for Hawaii when local counsel is retained. At any rate, the significant point is that the District Judge was advised several times before trial (R. 147, 161, 180) that Mr. Miho was not in fact making a general appearance, but had been retained solely to handle preliminary matters until appellant could obtain the services of mainland counsel. The Judge's continuing reliance upon the formal general appearance after he knew that there was not in fact a general representation only compounds the arbitrary nature of his action.

ponements of his trial.[41] But nothing like that is presented here. On the contrary, appellant's case was given an exceptionally brief period between information and trial (see n. 36, p. 71, *supra*), despite the fact that appellant had already considerably expedited these proceedings by waiver of indictment (R. 321). The only month delay requested by appellant was perfectly reasonable and proper to permit counsel from the District of Columbia to prepare for trial, arrange his other pending commitments and come 5000 miles to Hawaii for the trial. The setting of the trial for a date when, as the Court was informed, appellant's chosen counsel would be unavailable, was an arbitrary denial of rights under the Sixth Amendment. It is especially arbitrary where the trial Judge knew the importance of mainland counsel's presence, having himself authorized appellant's trip to the mainland to obtain that counsel (R. 42-48). Certainly nothing here presented justifies the trial Judge's undue haste to try the appellant before the counsel obtained on that trip could come to Hawaii.[42]

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[41] 50 Col. Law Rev. 87, 91, *"Client's Ability to Discharge Counsel"*, suggests that "even aside from constitutional guarantees, it would seem that any request by a defendant in a criminal case for permisson to dismiss his attorney which does not involve delay or other interference with the administration of the trial, and probably even one which does involve a reasonable delay, should be granted." One compelling reason, of course, for favoring the constitutional right over the court's docket, is that to do otherwise when chosen counsel is not immediately available but will be in the foreseeable future, is arbitrarily to penalize the defendant for the unavailability of his attorney.

[42] Although no prejudice need be shown in connection with deprivation of counsel under the Sixth Amendment, which is deemed inherently prejudicial (see *Glasser* v. *United States*, 315 U.S. 60, 75-76), it should be noted that appellant was, of course, prejudiced by the denial of his right to be represented by Mr. Rauh. As Mr. Rauh indicated in subsequent offers of proof (R. 379-382), he would have sought to develop considerable factual material at the trial bearing upon the vital and untested statutory, constitutional and international contentions raised both in the District Court and on this appeal. Without that material appellant's ability adequately to present those questions in this Court is seriously impaired.

But if all the foregoing were rejected, the Court's action would still be in violation of appellant's Sixth Amendment rights. Having refused a postponement to permit appellant's defense by his chosen counsel, it was totally arbitrary and capricious and in clear violation of appellant's Sixth Amendment rights, also to deny him the right to represent himself at the trial and to force him to accept representation by an attorney he did not desire. The Court may not force unwanted counsel upon a competent defendant, depriving him of his Sixth Amendment right to be his own counsel, and to plead his own case. See *Swope* v. *McDonald,* 173 F. 2d 852, 854, n. 2; *Betts* v. *Brady,* 316 U.S. 455, 465-468; *Powell* v. *Alabama,* 287 U.S. 45, 68. As the Supreme Court stated in *Adams* v. *United States*, 317 U.S. 269, 279, the Sixth Amendment affords "*the right to assistance of counsel and the correlative right to dispense with a lawyer's help* . . ." The District Judge's refusal to permit appellant, instead of his dismissed and undesired local counsel, to make his own defense and to speak for himself before court and jury is, we believe, totally without reason, justification or precedent in the history of federal criminal trials. The unconstitutionality of the Judge's action in this respect requires no further elaboration.

Appellant having been denied his Sixth Amendment rights, the trial was a nullity and appellant's conviction must be reversed.

Conclusion

It is respectfully submitted that, for the reasons set forth in Points I, II, III and IV, this Court should direct the entry of a judgment of acquittal.

If, however, this Court should feel that the instant record developed in the absence of appellant's chosen counsel is inadequate to resolve the vital legal issues presented in

one or more of those four Points, then it is respectfully submitted that, at the very least, a new trial should be directed both for that reason and because of the denial of counsel set forth in Point V.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
LUCIEN HILMER,
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Attorneys for Appellant.

APPENDIX A

UNITED STATES ATOMIC ENERGY COMMISSION
WASHINGTON 25, D. C.

No. A-77
Tel. HAzelwood 7-7831
Ext. 3446

For Immediate Release
(Friday, April 11, 1958)

AEC Issues Regulations Prohibiting Entry Into Weapons Testing Danger Area by Persons Subject to the Jurisdiction of the U. S.

The Atomic Energy Commission is issuing regulations which prohibit entry into the Danger Area of the Eniwetok Proving Ground of U. S. citizens and all other persons subject to the jurisdiction of the United States, its territories and possessions.

The regulations effective from April 11, 1958 until the Hardtack test series is completed prohibit entry, attempted entry or conspiracy to enter the danger area, the boundaries of which were announced on February 14, 1958.

The regulations were filed today with the Federal Register. A copy of the regulations is attached.

Attachment

41158

UNITED STATES ATOMIC ENERGY COMMISSION

Title 10—Atomic Energy

Chapter 1—Atomic Energy Commission

Part 112—Eniwetok Nuclear Test Series, 1958 [43]

On February 14, 1958, the Atomic Energy Commission issued public notice of the danger area to be established April 5, 1958 in connection with the forthcoming Hardtack nuclear test series to be conducted at the Eniwetok Proving Ground in the Marshall Islands. The efficient and early completion of this test series, which is to begin in

[43] This regulation was withdrawn on Sept. 8, 1958 (AEC Release, No. A-236).

April 1958, is of major importance to the defense of the United States and of the free world.

To avoid any unnecessary delay or interruption of that test activity, and to protect the health and safety of the public, the Atomic Energy Commission is issuing the following regulations which will be effective until the HARDTACK test series is completed:

In view of the importance of these tests to the national defense, the potential hazard to the health and safety of individuals who enter the danger area, and the early starting date of the tests, the Atomic Energy Commission has found that general notice of proposed rule making and public procedure thereon would be contrary to the public interest; and that good cause exists why these rules should be made effective without the customary period of notice.

Pursuant to the Administrative Procedures Act, Public Law 404, 79th Congress, 2d Session, the following rules are published as a document subject to codification, to be effective upon filing with the Federal Register:

Sec.

Authority: Secs. 112.1 to 112.4 issued under Sec. 161, 68 Stat. 948; 42 U.S.C. 2201. Interpret or apply Sec. 91, 68 Stat. 936; 42 U.S.C. 2121; Sec. 2, 68 Stat. 921; 42 U.S.C. 2012; and Sec. 3, 68 Stat. 922; 42 U.S.C. 2013. For the purposes of Sec. 223, 68 Stat. 958; 42 U.S.C. 2273, Sec. 112.4 issued under Sec. 161 i.

Sec. 112.1 *Purpose.* The regulations in this part are issued in order to permit the Atomic Energy Commission in the interest of the United States to exercise its authority pursuant to section 91.a. of the Atomic Energy Act of 1954, as efficiently and expeditiously as possible with a minimum hazard to the health and safety of the public.

Sec. 112.2 *Scope.* This part applies to all United States citizens and to all other persons subject to the jurisdiction

of the United States, its Territories and possessions.

Sec. 112.3 *Definitions.* As used in this part:

(a) "Danger Area" means that area established, effective April 5, 1958, encompassing the Bikini and Eniwetok Atolls, Marshall Islands and which is bounded by a line joining the following geographic coordinates:

18° 30′ N.	156° 00′ E.
18° 30′ N.	170° 00′ E.
11° 30′ N.	170° 00′ E.
11° 30′ N.	166° 16′ E.
10° 15′ N.	166° 16′ E.
10° 15′ N.	156° 00′ E.

(b) "HARDTACK test series" means that series of nuclear tests to be conducted by the Atomic Energy Commission and the Department of Defense at the Eniwetok Proving ground located within the above defined danger area and which are to begin in April 1958, and end at an announced time during the calendar year 1958.

Sec. 112.4 *Prohibition.* No United States citizen or other person who is within the scope of this part shall enter, attempt to enter or conspire to enter the danger area during the continuation of the HARDTACK test series, except with the express approval of appropriate officials of the Atomic Energy Commission or the Department of Defense.